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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 130.

T. H DAVISON, ET AL., OWNERS OF STEAMSHIP WHICKHAM, APPELLANTS.

vs.

GEORGE A. VON LINGEN, ET AL., TRADING AS A. SCHUMACHER & CO.

APPEAL FROM THE CIRCUIT COURT FOR THE MARYLAND DISTRICT.

BRIEF FOR APPELLANTS.

A. STIRLING, JR.,
For Appellants.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 120.

T. H. DAVISON, ET AL., OWNERS OF STEAMSHIP WHICKHAM, APPELLANTS.

vs.

GEORGE A. VON LINGEN, ET AL., TRADING AS A. SCHUMACHER & CO.

APPEAL FROM THE CIRCUIT COURT FOR THE MARYLAND DISTRICT.

BRIEF FOR APPELLANTS.

This case is one of cross-libels on the charter of the British steamer Whickham, owned by Appellants, to the Appellees, merchants in Baltimore. The contention of the owners being that charterers broke the contract by refusing to load the vessel, and charterers claiming a breach of the charter by owners, in that the vessel when chartered, was not as represented in the charter. "Sailed or about to sail from Benisaf with cargo for Philadelphia." Record, pages 1 to 11, inclusive.

In the District Court, the owners recovered $4093.18 damages, and the libel of charterers was dismissed. Record, pages 37 to 44 inclusive, opinion and decrees in District Court.

On appeal of charterers to Circuit Court. The libel of owners was dismissed, and charterers recovered $2128.07, with interest.

It is admitted in the cause as found as a fact by the Circuit Court, that these amounts are correct, depending alone in the question of which party is entitled in law upon the facts to recover.

Finding of facts by Circuit Court, pages 54, 55, 56, opinion of Chief Justice Waite and constructions of law, pages 56, 57, 58. Decree reciting findings of fact and conclusions of law, pages 59, 60, 61.

ASSIGNMENT OF ERRORS.

Appellant assigns for errors.

That the Circuit Court erred in the conclusions of law on the finding of facts. That is in ruling as law,

1st. That the Whickham was not about to sail from Benisaf in August, within the meaning of that term as used in the charter.

2nd. That Schumacher & Co. were entitled in law on said fact to recover.

3rd. That in law on such facts the cross-libel of Davison, et al., must be dismissed.

The finding of facts by the Circuit Court, is as follows: pages 59, 60, 61.

1. The British Steamer Whickham, owned by T. H. Davison and others, the Defendants in the original libel, sailed from Shields, on the 9th of July, 1879, bound for Lisbon, where she arrived on the 16th, and having discharged her cargo, sailed again in ballast on the 23rd for Benisaf, on the coast of Morocco, to take a load of iron ore, under a charter for Philadelphia.

She passed Gibraltar on the 25th, and arrived at Benisaf, at 4.30 P. M., Saturday, the 26th.

She began taking in cargo under the charter for Philadelphia during the forenoon of Monday the 28th.

On that day she took on board 115 tons, and on the 29th about 90 tons, but on the 30th none, and on the 31st only four boat loads.

During this time there was delay in delivering the cargo on board, as other vessels in port were entitled to precedence in loading.

After the 31st, the cargo was put on board with as much dispatch as could have been expected at that place, and it was all in on the 7th of August, at 5.30 P. M. An hour later the vessel sailed, and stopping five hours at Gibraltar for coal on the 9th, arrived at Philadelphia on the 2nd of September.

She completed her unloading at that port on the 7th.

2. The usual cargo at Benisaf, is iron ore. In loading, a vessel lies out in the stream about a quarter of a mile from the shore, and the ore is taken to her in small boats, from five to seven tons burthen each. It is then passed up the ship's side in baskets.

Two or three stages are put up between the boats and the ship's decks, and two men on each stage receive and pass the baskets.

This is the only way of loading such cargo at that port.

3. About the first of August, Gregg & Co., a firm of ship brokers in Philadelphia, were authorized by cable message from the owners in England, to procure a charter for the Whickham, to carry grain from the United States on her return voyage.

Not being able to do this in Philadelphia, the firm on the first of August telegraphed Mr. Eareckson, a ship broker in Baltimore, to look for a charter in that city.

In their telegram, it was said that the vessel "had sailed, or was about to sail from Benisaf with cargo for Philadelphia."

The precise form of the authority given by the owners to Gregg & Co., is nowhere shown from the evidence, further than may be inferred from the telegram to Eareckson.

4. A short time before the first of August, Schumacher & Co., of Baltimore, the original libellants, employed Mr. Foard, another ship broker in that city, to procure them a vessel to take a cargo of grain to Europe, which they were under contract to ship in August.

He finding that steamers for that month was scarce, and hearing of the Whickham, took Mr. Eareckson to the office of Schumacher & Co., and suggested that she might do.

At the interview which then took place, it was understood by all parties, that a vessel was wanted that could be loaded in August, and that no other would answer the purpose.

Schumacher & Co. doubting whether the Whickham would arrive in time, wanted a guarantee that she would, but this was declined.

All parties then made their calculations as to the probable time of her arrival, upon the basis of the language in the telegram, and finally Schumacher & Co. agreed to take her, first however, providing that she might be loaded in Philadelphia or Baltimore, at their option, intending if she did not arrive in time for Baltimore, to get her cargo under their contract in Philadelphia. In these calculations it was assumed by all that she would get away from Benisaf not later than the second of August, and that her voyage across would probably be about twenty days.

This all occurred in Baltimore on the first of August, and it does not appear from the evidence that any of the parties knew anything of the movements of the vessel, except as they were to be inferred from the telegram.

There was no communication with Benesaf by telegraph. The nearest telegraphic station being at Gibraltar, which was a day's sail away.

5. As soon as the bargain was concluded, Eareckson sent to Gregg & Co. for a charter party in form. They immediately sent the draft of one in which the vessel was described as sailed from or loading at Benisaf. This, Schumacher declined to accept on the ground, that their agreement was for a vessel that "had sailed or was about to sail from Benisaf with cargo for Philadelphia."

This being communicated to Gregg & Co., they at once sent forward a new draft to meet the wishes of Schumacher & Co., and using the language insisted upon.

This new draft reached Baltimore on the second of August, and was duly executed by all parties. This is the instrument, a copy of which is marked Exhibit "A," and filed with the original libel. From this it appears in the printed blank which was used, there were the following words: "Charterers to have option of can-

celling this charter party, should vessel not have arrived at loading port, prior to ———."

These words were erased by drawing a pen through them before signing.

6. Schumacher & Co. having ascertained on the 9th of August, that the steamer passed Gibraltar outwardly, from Benisaf on that day, and being then satisfied that she would not arrive on time to load either at Baltimore or Philadelphia, in August, at once set about securing another vessel, and on the 16th got one which they afterwards loaded at an increased cost of freight to them over what they would have been compelled to pay the Whickham.

7 The discharge of the cargo of iron ore from the Whickham, was completed with dispatch at Philadelphia; and on the 7th of September, she sailed for Baltimore, where she arrived on the 9th, and was tendered to Schumacher & Co. under the charter to load on the 11th. They declined to accept her for the reason, that as they claimed when the charter party was entered into, she had neither sailed nor was about to sail from Benisaf, within the meaning of that provision of the charter as understood by the parties.

The charter party in question mentioned in the finding as Exhibit "A," with original libel will be found in full on pages 3, 4, 5, of record, and the parts pertinent to the controversy on page 38 of the record, in the opinion of the District Judge.

The argument briefly on the language in controversy may be discussed first, as to the meaning of the words without the attendant circumstances found by the finding, and on the theory that in law they will not be so applied. The language is sailed with cargo, or about to sail with cargo. The latter clause expresses some condition which has detained the vessel from sailing, if she has not sailed. She has either sailed with her cargo, or she is about to sail with her cargo. The words with cargo, are the words, and the only words which tie, confine, and explain the words about to sail.

If she has all her cargo on board this 1st day of August, she has sailed. If not, the delay is not having it all, and she will sail, when with dispatch, all her cargo which is now loading with dispatch is on board.

A vessel, at least, with any substantial part of her cargo on board, and taking it on with dispatch according to the known circumstances of a port, for a determined place, may be said to be about to sail to such port with cargo.

The phrase "loading at Benisaf" has a wider meaning. A vessel which has come to a port for cargo, and has her cargo engaged, has served notice of readiness to load, may be clearly said to be loading at that place. But the words about to sail with cargo, imply, that the vessel is delayed from sailing some period of time, and yet is with cargo. That is, has put part on board, and not all. The only detaining words are the word cargo. It implies a detention caused by cargo, as clearly as the words sailed with cargo, imply that there is no detention by cargo.

Diligence then being found, and a substantial part of the cargo being on board. On what principle, and how are these rather loose words? but still chosen by the parties, and as definite as the owners would contract for to be limited to any greater quantity of cargo on board, or to any particular period of delay.

To say that they mean "about ready to sail with cargo," or "substantially ready to sail," is to add, it is respectfully submitted, new, stronger, and more definite language than that which the owners of the vessel contracted for.

It amounts to presuming in law, that if the words about ready to sail had been suggested by the charterers, they would have been accepted.

It is submitted, that about to go and about ready to go, have not the same meaning.

Now as to the circumstances surrounding the contract.

They consist of the circumstances at Benisaf as known to the parties, and of the circumstances as disclosed at Baltimore.

Those at Benisaf were that no knowledge of the vessel could be had by owner, or supposed by charterers to be had, except the date of the vessel passing Gibraltar, and from the distance from there to Benisaf. The date of the arrival at Benisaf. The mode of loading there. The possibility of being detained by having to wait her turn. The only thing they could assume was that the vessel was taking in cargo, and that she had either met no detention by waiting for turn and had sailed, had had time to take all

in, or she had some indefinite part of cargo still to take in, and would sail as soon as it was all in.

Now as to the circumstances at Baltimore. There the charterers wanted a vessel for an August shipment and so said to Eareckson. But it is also true, that they had been looking for an August vessel and found them scarce. Under these circumstances, they ask a guaranty that the Whickham will arrive in time for August loading. It is refused. Schumachers doubt if the Whickham will arrive in time. That is, they doubt whether her condition as described in the telegram, sailed or about to sail with cargo, expresses the condition of a vessel reasonably sure or probable to arrive in time for August loading. Eareckson expresses the opinion that she will arrive, but they knew he knew and could know only the date of the vessel's arrival in Benisaf. A calculation is based on the hypothesis that she would sail by the 2d, and that 20 days was a probable passage to Philadelphia. This could only mean as a legal inference from facts that they supposed from the language of the telegram she might be so able.

How could they suppose any more in the face of the refusal to guarantee. They did not even ask for a stipulation, vessel ready to sail on the 2d, and to arrive in time for August loading, dangers of the seas, and accidents to masters excepted. And in their emergency for a vessel, and with the knowledge that when she passed Gibraltar outwards to Philadelphia, they could then tell whether she would arrive in time for their purpose, and could then far in advance of her arrival seek another vessel, and of course take the chances of lower freight, they, with the expressed desire to have a vessel for August loading, take this general language, with a full knowledge, and in law imputed knowledge, of all the facts surrounding the loading at Benisaf.

In reference to the assumptions and calculations of the parties at Baltimore, and the risks the charterers took, it may be noticed that the vessel sailed from Benisaf on the 7th of August and arrived at Philadelphia on the 2d of September, and with dispatch finished unloading on the 6th. She had a most favorable voyage, makes it clear that if she had sailed on the 1st or 2nd of August, she could not have arrived at Philadelphia and unloaded in time for an August loading.

What is this by clear inference from the circumstances but that the owner did not understand by such language as about to sail

with cargo any such forwardness as to indicate a probable arrival in time.

It is submitted that to construe these circumstances in connection with the language, as implying a state of forwardness indicated by the vessels about ready to sail, gives the charterers the same right as if the guarantee had been given, or the words in the printed charter as to charterers, option to cancel had not been stricken out.

It is submitted that the circumstances found at Baltimore, can in law be evidence only of the hopes and desires of the parties as to what might be possible to happen, and not that the words gave that meaning in themselves.

It is submitted that where parties who wish a distinct time for arrival, and fail to get it—and submit under the fact of the scarcity of vessels to general language—applied to a vessel at a port like Benisaf, the Court should be slow to extend the meaning of the words in the light of the charterers' wishes and desires for an early arrival—which wishes and desires he has communicated, but the careful and exact gratification of which by contract words, he has been refused.

The law established that such words in a charter, are a warranty of the condition of things expressed so far from leading to a stricter construction of words—of general and indefinite meaning—should lead in the other direction.

It is submitted that to give this prominence in the legal construction of the words to the fact that for the purpose of the charterers' time was of the essence when he failed to get definite time fixed—is practically to make the event of the arrival or not in time for charterers' purpose control the meaning of the contract.

That the words in question should be determined by the Court with reference to a vessel like the Whickham, when at Benisaf, under the circumstances as known by both parties.

That the circumstances surrounding the vessel at Benisaf, are those to be looked at in interpreting the words.

That the words used were known to the charterers as the only one the vessel's agents had a right to use, and that their necessities, nor the hypothetical calculations of Eareckson, nor the assumption of Eareckson and the charterers on any of the facts found in the finding, can have an effect on the meaning of the words.

That the words in question mean only that as loading her cargo, was the only thing which could be supposed to be delaying her at that place, she was to sail as soon as with reasonable diligence she could get her cargo on board.

Dimech *vs.* Corlett, 12 Moore, P. C., 199.
The Wellington, 1 Bissell, 281.
Barker *vs.* Brace, 3 Conn., 9.

A. STIRLING, JR.,
for Appellants.

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T. H. DAVISON, ET AL., OWNERS OF THE STEAMSHIP "WHICKHAM," APPELLANTS.

vs.

GEORGE A. VON LINGEN, CARL A. VON LINGEN AND WM. G. ATKINSON, TRADING AS A. SCHUMACHER & CO.

PHILADELPHIA LAW ASSOCIATION

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

JOHN H. THOMAS,
T. WALLIS BLAKISTONE,
For Appellees.

JOHN MURPHY & CO., PRINTERS, BALTIMORE.

Supreme Court of the United States,

OCTOBER TERM, 1884.

No. 130.

T. H. DAVISON ET AL., OWNERS OF THE STEAMSHIP "WHICKHAM," APPELLANTS,

vs.

GEORGE A. VON LINGEN, CARL A. VON LINGEN AND WM. G. ATKINSON, TRADING AS A. SCHUMACHER & CO.

Appeal from the Circuit Court of the United States for the District of Maryland.

APPELLEE'S BRIEF.

On the 1st day of August, 1879, the appellees, who were merchants in the City of Baltimore, chartered the Steamship "Whickham," described in the Charter Party as "now sailed or about to sail from Benizaf with cargo for Philadelphia," to take a cargo of grain to Europe. See Charter Party, Record, p. 3. The charterers were under contract to ship the cargo during that month. Record, p. 55.

The Steamer did not sail from Benizaf until 7.30 P. M., on the 7th of August, and arrived at Philadelphia on the 2d of September. Record, p. 54.

She discharged her inward cargo and went to Baltimore, where she was tendered to the charterers on September 11th. They declined to accept her for the reason that, as they claimed, when the Charter Party was entered into, she had neither sailed nor was about to sail with cargo from Benizaf, within the meaning of that provision in the Charter Party; and filed their libel found on pp. 1 and 2 of the Record.

The owners of the Steamer then filed the cross-libel on pp. 7 and 8.

The District Court dismissed the original libel (p. 43), and rendered a decree in favor of the Steamship for $4,093.18, (p. 44.)

The charterers appealed, and the Circuit Court (Chief Justice Waite presiding) delivered the opinion on pp. 56–7–8 of the Record, reversed the District Court and rendered the decree on p. 61; the Court having first found, and separately stated the facts and conclusions of law on which the same was rendered as follows:

FACTS FOUND BY THE COURT.

1. The British steamer "Whickham," owned by T. H. Davison and others, the defendants in the original libel, sailed from Shields on the 9th of July, 1879, bound for Lisbon, where she arrived on the 16th, and having discharged her cargo, sailed again in ballast on the 23rd for Benizaf, on the coast of Morocco, to take a load of iron ore under a charter for Philadelphia. She passed Gibraltar on the 25th, and arrived at Benizaf at 4.30 p. m., Saturday, the 26th. She began taking in cargo under the charter for Philadelphia during the forenoon of Monday, the 28th. On that day she took on board 115 tons, and on the 29th about 90 tons, but on the 30th none, and on the 31st only four boat-loads. During this time there was delay in delivering the cargo on board, as other vessels in port were entitled to precedence in loading. After the 31st, the cargo was put on board with as much dispatch as could have been expected at that place, and it was all in on the 7th of August at 5.30 p. m. An hour later the vessel sailed, and, stop-

ping five hours at Gibraltar for coal on the 9th, arrived at Philadelphia on the 2nd of September. She completed her unloading at that port on the 7th.

2. The usual cargo at Benizaf is iron ore. In loading, a vessel lies out in the stream, about a quarter of a mile from the shore, and the ore is taken to her in small boats of from five to seven tons burthen each. It is then passed up the ship's side in baskets. Two or three stages are put up between the boats and the ship's decks, and two men on each stage receive and pass the baskets. This is the only way of loading such cargo at that port.

3. About the first of August, Gregg & Co., a firm of ship brokers in Philadelphia, were authorized by cable message from the owners in England to get a charter for the Whickham to carry grain from the United States on her return voyage. Not being able to do this in Philadelphia, the firm on the first of August, telegraphed Mr. Erickson, a shipbroker in Baltimore, to look for a charter in that city. In their telegram it was said that the vessel "had sailed or was about to sail from Benizaf with cargo for Philadelphia." The precise form of the authority given by the owners to Gregg & Co., is nowhere shown from the evidence further than may be inferred from the telegram to Erickson.

4. A short time before the first of August, Schumacher & Co., of Baltimore, the original libellants, employed Mr. Foard, another ship broker in that city, to procure them a vessel to take a cargo of grain to Europe, which they were under contract to ship in August. He, finding that steamers for that month were scarce, and hearing of the Whickham, took Mr. Erickson to the office of Schumacher & Co., and suggested that she might do. At the interview which then took place it was understood by all parties that a vessel was wanted that could be loaded in August, and that no other would answer the purpose. Schumacher & Co., doubting whether the Whickham could arrive in time, wanted a guaranty that she would, but this was declined. All parties then made their calculations as to the probable time of her arrival, upon the

basis of the language in the telegram, and finally Schumacher & Co. agreed to take her—first, however, providing that she might be loaded in Philadelphia or Baltimore, at their option, intending if she did not arrive in time for Baltimore, to get her cargo under their contract in Philadelphia. In these calculations it was assumed by all that she would get away from Benizaf not later than the second of August, and that her voyage across would probably be about twenty days. This all occurred at Baltimore on the first of August, and it does not appear from the evidence that any of the parties, either in Philadelphia or Baltimore, knew anything of the movements of the vessel, except as they were to be inferred from the telegram. There was no communication with Benizaf by telegraph, the nearest telegraphic station being at Gibraltar, which was a day's sail away.

5. As soon as the bargain was concluded, Erickson sent to Gregg & Co., for a Charter Party in form. They immediately sent the draft of one, in which the vessel was described as "sailed from or loading at Benizaf." This Schumacher & Co. declined to accept, on the ground that their agreement was for a vessel that "had sailed, or was about to sail, from Benizaf, with cargo for Philadelphia." This being communicated to Gregg & Co., they at once sent forward a new draft, to meet the wishes of Schumacher & Co., and using the language insisted upon. This new draft reached Baltimore on the second of August, and was duly executed by all parties. This is the instrument, a copy of which is marked Exhibit A, and filed with the original libel. From this it appears that in the printed blank which was used there were the following words: "Charterers to have option of cancelling this Charter Party should vessel not have arrived at leading port prior to ———." These words were erased by drawing a pen through them before signing.

6. Schumacher & Co., having ascertained on the 9th of August that the steamer passed Gibraltar outwardly from Benizaf on that day, and being then satisfied that she would not arrive in time to

load either at Baltimore or Philadelphia in August, at once set about securing another vessel, and on the 16th, got one, which they afterwards loaded at an increased cost of freight to them over what they would have been compelled to pay the Whickham of one thousand nine hundred and eighty-eight dollars and twenty-five cents. It is agreed that this new charter was effected on as favorable terms as it could have been in the month of August, and that if Schumacher & Co. are entitled to recover at all, it must be for the increase in the cost of freight which they paid.

7. The discharge of the cargo of iron ore from the Whickham was completed with dispatch at Philadelphia, and on the 7th of September she sailed for Baltimore, where she arrived on the 9th, and was tendered to Schumacher & Co., under the charter, on the 11th. They declined to accept her for the reason that, as they claimed, when the Charter Party was entered into, she had neither sailed, nor was about to sail, from Benizaf, within the meaning of that provision in the charter as understood by the parties. Another charter was then obtained, but at a loss to her of four thousand and ninety-three dollars and eighteen cents, as of May 10th, 1880. It is agreed that this charter was as favorable as any that could have been effected, and that if her owners are entitled to recover at all, it must be for the above amount as their loss.

CONCLUSIONS OF LAW.

1. That the Whickham was not about to sail from Benizaf on the 1st of August, within the meaning of that term as used by the Charter Party.

2. That Schumacher & Co. are entitled to recover from the defendants to their libel the sum of $1,988.25, and the interest thereon from September 11, 1879.

3. That the cross-libel of T. H. Davison and others must be dismissed. See pp. 54 to 61, inclusive.

The owners of the Steamer then appealed to this Court.

the merchants, upon the ground that it was not what had been agreed upon.

They were not willing to take her if she was at Benizaf "*loading.*" Here they drew the distinction between a vessel *loading*, and one *about to sail*. She must be at the latest "about to sail, *i. e.*, ready to sail—on the point of sailing, with cargo *already on board.*

The charter party (pp. 3 and 4) was then executed, wherein Schumacher & Co. reserved the option of loading her at Philadelphia, if she was too late to be loaded in Baltimore. Record, p. 55.

Instead of having sailed, or being *about to sail, with cargo*, she had only three-elevenths of her cargo on board, at a place where loading was slow, precarious and contingent upon the weather, and the number of vessels awaiting cargoes, as well as the order of their arrival.

She did not in fact complete her loading for a full week afterwards.

In dealing with steamships, much less latitude, as to time, is given to them than to sailing vessels, for obvious reasons.

Time was of the essence of this Contract. That the charter would not have been made if it had been known that the Steamer would not leave Benizaf until the evening of the 7th, is apparent from the fact that as soon as it was ascertained that she did not pass out from Gibraltar until the 9th, steps were taken by the charterers to get another vessel in her place, which they did, at an advance of $1,988.25 freight. Pages 60 and 61.

The Whickham arrived too late to answer the purpose of her charter.

JOHN H. THOMAS,
T. WALLIS BLAKISTONE,
For Appellees.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 935.

EUGENE J. A. DRENNEN, FREDERICK W. STARR AND EDWARD D. EVERETT, PARTNERS AS DRENNEN, STARR & EVERETT, PLAINTIFFS IN ERROR,

vs.

THE LONDON ASSURANCE CORPORATION.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

FILED SEPTEMBER 15, 1884

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

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EUGENE J. A. DRENNEN, FREDERICK W. STARR AND EDWARD D. EVERETT, PARTNERS AS DRENNEN, STARR & EVERETT, PLAINTIFFS IN ERROR,

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the district of Minnesota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said circuit court before you, or some of you, between Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, partners in business under the firm name and style of Drennen, Starr & Everett, plaintiffs, *vs.* The London Assurance Corporation, defendants, a manifest error hath happened, to the great damage of the said Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, partners in business under the firm name and style of Drennen Starr & Everett, plaintiffs, as is said, we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States, at the capital, in the city of Washington, together with this writ, so that you have the same at the said place before the justices aforesaid on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 12th day of July, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the 109th year.

[SEAL.] OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States of America for the District of Minnesota.

2 *The Answer of the Judges of the Circuit Court of the United States for the District of Minnesota, in the Eighth Circuit, in Within Writ Mentioned.*

UNITED STATES OF AMERICA, *District of Minnesota,* } *ss:*

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully certified to the Justices of the Supreme Court of the United States of America within mentioned, in a certain schedule to this writ annexed, marked "A," as within it is commanded.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Saint Paul, in the district of Minnesota, this 26th day of August, in the year of our

Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth year.

[SEAL.] OSCAR B. HILLIS,
Clerk U.S. Circuit Court, Dist. of Minnesota.

3 SCHEDULE "A."

UNITED STATES OF AMERICA, *ss:*

To the London Assurance Corporation:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eighth circuit, district of Minnesota, wherein Drennen, Starr & Everett are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Rensellaer R. Nelson, judge of the district court of the United States, district of Minnesota, the 11th day of July, in the year of our Lord one thousand eight hundred and eighty-four.

R. R. NELSON,
District Judge.

3½ End.: C. Law, 633. United States circuit court, eighth circuit district of Minnesota. Drennen, Starr & Everett, pl'ffs in error, *vs.* The London Assurance Corporation, defendants in error. Citation. Due service of the within citation admitted, this 17th day of July, A. D. 1884. Cameron, Losey & Bunn, C. K. Davis, def'ts attorneys. Filed July 28th, 1884. Oscar B. Hillis, clerk.

4 Pleas before the honorable the judges of the circuit court of the United States of America for the district of Minnesota, of the June term of said court, held in the city of St. Paul, in said district, in the year of our Lord 1884, and of our Independence the 108th year.

Be it remembered that on this 31st day of May, A. D. 1884, came the defendant above named, by Cameron, Losey & Bunn and C. K. Davis, its attorneys, and file in the clerk's office of said court a return from the district court of Hennepin county, State of Minnesota, in words and figures following, to wit:

5 *Summons.*

STATE OF MINNESOTA, } ss:
County of Hennepin, }

District Court, Fourth Judicial District.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. EVERETT, partners in business under the firm name and style of Brennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION, Defendant.

The State of Minnesota to the above-named defendant:

You, The London Assurance Corporation, are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, a copy of which is attached hereto, and is herewith served upon you, and to serve a copy of your answer to said complaint on the subscriber, at his office, in the city of Minneapolis, in the county of Hennepin, within twenty days after the service
6 of this summons upon you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will take judgment against you for six thousand dollars, with interest thereon from the 12th day of November, 1883, at the rate of seven per cent. per annum, together with the costs and disbursements herein.

Dated January 8th, A. D. 1884.

L. J. C. DRENNEN,
Plaintiffs' Attorney, Minneapolis, Minn.

Complaint.

STATE OF MINNESOTA, *Hennepin County:*

District Court, Fourth District.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. EVERETT, partners in business under the firm name and style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION, Defendant.

7 The plaintiffs, Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, complain of the above-named defendant, and allege that at the time of making each of the contracts of insurance hereinafter referred to they were, ever since have been, and are now partners in business under the firm name and style of Drennen, Starr and Everett, and that at and during all said time the defendant was and is a corporation and insurance company created, organized, and existing under the laws of Great Britain under the name of the London Assurance Corporation, and doing business as such at its agency in the city of Minneapolis, in said State of Minnesota.

Plaintiffs allege that at said Hennepin county, on the 10th day of March, A. D. 1883, in consideration of $10.00 then paid
8 defendant by plaintiffs therefor, defendant made, executed, and delivered to plaintiffs, under their firm name aforesaid, its certain policy of insurance in writing, a copy of which is attached to this complaint, marked Exhibit "A," and is here referred to as part thereof, and thereby defendant insured plaintiffs against any loss or damage by fire for one year from said last-mentioned date to the amount of $1,000.00 on their general stock of merchandise while in the building therein referred to; that afterwards, and before the destruction of the merchandise, as hereinafter set forth, in the consideration of the additional sum of $2.30, paid defendant by plaintiff therefor, defendant consented to and did insure by amendment to said policy and further agreement the same said merchandise while in premises different from those in which it
9 was situate when first insured by said policy which said consent, amendment, and additional agreement was in writing, and was attached to said policy, and a copy thereof appears in said Exhibit "A," and is also made part of this complaint.

Plaintiffs also allege that at said county of Hennepin, also on said 10th day of March, 1883, in consideration of the additional sum of 55.00 then paid defendant therefor by plaintiffs, defendant made, executed, and delivered to plaintiffs under their said firm name its certain other policy of insurance in writing, a copy of which is also attached to this complaint, marked Exhibit "B," and is here referred to as part hereof, and defendant thereby insured plaintiffs against any loss or damage by fire for one year from said last-mentioned
10 date to the amount of $5,000.00 in addition to the amount first hereinbefore referred to on their said general stock of merchandise in said second policy described while in the building therein referred to. That afterwards and before the descruction of said merchandise, as hereinafter set forth, in consideration of an additional payment of $8.25 made by plaintiffs to defendant therefor, defendant consented to and did insure by amendment to said policy hereinbefore lastly referred to and further agreement the same merchandise in premises different from those in which it was situate when first insured by said policy, which said consent, amendment, and additional agreement was in writing, and was attached to said policy, and a copy thereof appears in said Exhibit "B," and is here referred to part of this complaint. Plaintiffs allege that at
11 the time of making said insurance, and from thence until the happening of the fire hereinafter mentioned said plaintiffs were the owners of said insured property, which at the time of said fire was of the value of $123,000.00 and more, and at the said time the total value of said property and merchandise largely exceeded all the insurance thereon.

Plaintiffs allege that on the 29th day of July, 1883, said stock of merchandise and property so insured as aforesaid, and while owned by them and while contained in the premises in said policies as amended as aforesaid described, was accidentally, partially, and almost wholly destroyed by fire, and was thereby damaged, without

plaintiff's fault, to the amount of $117,715.45. That notice of said loss was immediately thereafter given to said defendant, and
12 on or about the 13th day of September, 1883, plaintiff rendered to defendant at its office in New York a particular account and proof of said loss, signed and sworn to by said plaintiffs in the manner required by said policies, and produced, together with said account and proof a certificate under the hand and seal of a notary public nearest the place of said fire, not concerned in said loss as a creditor or otherwise, nor related to the assured, stating that he had examined the circumstances attending said loss, knew the character and circumstances of the assured, and verily believed said plaintiffs had without fraud sustained loss on the property insured as aforesaid to the amount of $117,715.46, and plaintiffs performed all the conditions required of them by said policies respectively.

Plaintiffs allege they had at the time of said fire other poli-
13 cies of insurance on said merchandise in addition to those hereinbefore referred to issued by defendant, amounting at the time of said fire to the sum of $91,000.00 and no more. Plaintiffs allege there is due them from said defendant on account of the contracts of insurance, fire and loss, as aforesaid, the sum of $6,000, which defendant has not paid, nor any part thereof, though often requested so to do.

Wherefore plaintiffs ask for a judgment against said defendant for said sum of $6,000.00, with interest thereon at the rate of seven per cent. per annum from the 12th day of November, A. D. 1883, and for their costs and disbursements in this behalf expended.

L. J. C. DRENNEN,
Attorney for Plaintiffs, Minneapolis, Minnesota.
SHAW & CRAY,
14, 15 *Of Counsel for Pl'ffs, Minneapolis, Minnesota.*

16 UNITED STATES BRANCH OF THE LONDON ASSURANCE.

Incorporated by Royal Charter, 1720.

No. 670,009—874. Sum assured, $1,000.

Head office, 7 Royal Exchange, London, E. C.
New York office, No. 88 Wall street.

This policy of insurance witnesseth, that Drennen, Starr and Everett having paid to the London Assurance Corporation, of London, the sum of ten dollars for insurance from loss or damage by fire (subject to the agreements and conditions herein contained) of the property hereinafter described, to the amount hereinafter
17 mentioned, not exceeding upon any one article the sum specified on such article, namely:

One thousand dollars, as follows: On their general stock of merchandise, consisting principally of crockery, china, glassware, silver, and plated ware, cutlery, and such other merchandise usually kept for sale in a crockery store, all while contained in the one-story brick, slate-roof freight warehouse, and platform belonging thereto, of the

Chicago, Milwaukee and St. Paul Railroad Co., situate on 3rd avenue S., bet. 2nd St. and Washington avenue.

Now, know all men by these presents, that the said corporation hereby agree to make good unto the said assured, their executors, administrators, and assigns, all such immediate loss or damage not exceeding in amount the sum or sums insured as above specified, nor the interest of the insured in the property, except as herein provided, as shall happen by fire to the property so specified from the 10th day of March, one thousand eight hundred and eighty-three, at twelve o'clock at noon, to the 10th day of March, one thousand eight hundred and eighty-four, at twelve o'clock at noon, the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at the office of the corporation, in New York, in accordance with the terms and provisions of this policy, unless the property be replaced or the corporation shall have given notice of their intention to rebuild or repair the damaged premises.

1. If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this contract, and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or an overvaluation, or any misrepresentation whatever, either in written application or otherwise; or if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the corporation written hereon; or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, and so remain with the knowledge of the assured, without notice to and consent of this corporation in writing; or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the assent of this corporation endorsed hereon; or if it be a manufacturing establishment running in whole or in part, over or extra time, or running at night, or if it shall cease to be operated, without special agreement endorsed on this policy; or if the property be sold or transferred; or any change takes place in title or possession (except by succession by reason of the death of the insured), whether by legal process or judicial decree or voluntary transfer or conveyance; or if this policy shall be assigned before a loss, without the consent of the corporation endorsed hereon; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy; or if the assured shall keep gunpowder, fireworks, nitro glycerine, phosphorous, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use camphene, spirit gas, or any burning fluid or chemical oils, without written permission in this policy, then, and in every such case, this

policy shall be void. Kerosene oil, however, may be used for lights in dwellings, stores, churches, and school-houses, and kept for sale in stores in quantities not exceeding five barrels—to be drawn by daylight only.

2. This insurance does not apply to or cover jewels, plate, watches, musical or scientific instruments (piano-fortes in dwellings excepted), ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture frames, sculpture, casts, models, or curiosities, unless particularly specified in this policy. This corporation shall not be liable, by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid; nor for loss by theft at or after a fire, nor for money or bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind; nor for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power; nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire; nor in consequence of any neglect or deviation from the laws or regulations of police, where such exists; nor for any loss caused by the explosion of gunpowder, or any explosive substance; nor by lightning, or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the casualty by explosion or lightning.

3. If a building shall fall, except as a result of a fire, all insurance by this corporation on it or its contents shall immediately cease and determine.

4. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the corporation, and so expressed in the written part of this policy, otherwise the policy shall be void. When property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate. Goods held on storage must be separately and specifically insured.

5. In case the use or occupation of the above-mentioned premises, at any time during the period for which this policy would otherwise continue in force, shall be so changed as to increase the risk thereupon, except as may be hereafter agreed to by this corporation, in writing upon this policy, from thenceforth, so long as the same shall be used, this policy shall be of no force or effect.

6. The best endeavors of the assured shall be used in saving and protecting the property from damage at and after the fire; and in case of failure so to do, this corporation will not be liable for damage caused by such failure; and there can be no abandonment to the corporation of the property insured.

The use of general terms, or anything less than a distinct, specific agreement, clearly expressed, and endorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

7. In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this corporation no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon; and it is hereby declared and agreed that in the case of the assured holding any other policy in this or any other company on the property insured, subject to the conditions of average, this policy shall be subject to average in like manner. Any floating policy attaching, in whole or in part, to the property covered by this policy, shall, as between the insured and this corporation, be considered as contributing insurance for the full amount of such policy, and liable as such to pay *pro rata* any loss, total or partial, on the property insured

Reinsurance, in case of loss, to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company.

8. This insurance may be terminated at any time at the request of the assured, in which case the corporation shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the corporation, on giving notice to that effect, and refunding a rateable proportion of the premium for the unexpired term of the policy.

9. Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the corporation, and, as soon thereafter as possible, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon, also the actual cash value of the property and their interest therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss, when and how the fire originated, and shall also produce a certificate under the hand and seal of a magistrate or notary public, (nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured,) stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination, or examinations under oath, by any person appointed by the corporation, and subscribe to such examinations when reduced in writing, and shall also produce their books of account and other vouchers, and exhibit the same for examination at the office of the corporation, and permit extracts and copies thereof to be made; the assured shall also produce certified copies of all bills and invoices, the originals of which have been lost, and shall exhibit all that remains of the property which was covered by this policy, damaged or not damaged, for examination to any person or persons named by the corporation.

When personal property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various arti-

cles according to their various kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the corporation, of the whole, naming the quantity, quality, and cost of each article. The amount of sound value and of damage shall then be ascertained by appraisal of each article by competent persons, (not interested in the loss as creditors or otherwise, nor related to the assured or sufferers,) to be mutually appointed by the assured and the corporation; their report, in writing, to be made under oath before any magistrate or other properly commissioned person; one-half of the appraisers' fees to be paid by the assured. The corporation reserves the right to take the whole or any part of the articles at their appraised value; and until such proofs, declarations, and certificates are produced, and examinations and appraisals are permitted by the claimants, the loss shall not be payable.

In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, together with their respective interests therein. If this policy is made payable, in case of a loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured. All fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this corporation under this policy.

But provided, in case differences shall arise touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award, in writing, shall be binding on the parties as to the amount of such loss of damage, but shall not decide the liability of the corporation under this policy; and provided further, that it shall be optional with the corporation to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention to do so within thirty days after receipt of the proofs herein required; and in all cases, whether this corporation elect to build or not, the insured shall, if required, furnish plans and specifications of the buildings destroyed.

The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made to ascertain the actual cash value.

Where property insured by this corporation is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured and the insurers, in such proportion as the whole sum insured bears to the whole value of the property insured, of which proof in due form shall be made by the claimant.

10. This insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided the premium therefor is paid and endorsed on this policy or a receipt given for

the same, and it shall be considered as continued under the original representation, and for the original amounts and divisions, unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the corporation by the assured at the time of renewal, this policy and renewal shall be void.

11. It is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by this corporation, shall be deemed to be the agent of the assured named in this policy, and not of this corporation under any circumstances whatever, or in any transaction relating to this insurance.

12. It is furthermore hereby expressly provided and mutually agreed, that no suit or action against this corporation, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this corporation after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

Gas.—The generating or evaporating within the building, or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting is prohibited under this policy, unless permitted in writing hereon.

Fences and other yard fixtures, also store furniture and fixtures are not insured under the within policy, unless separately as specifically mentioned.

Plate-glass doors and windows, when the plates are of the dimensions of nine square feet or more, are not covered by insurance on building, but must be separately and specifically insured.

Frescoed work, or gilding on walls or ceilings, is not covered by insurance on the building, but must be separately and specifically insured.

Builders' risk.—The working of carpenters, roofers, tinsmiths, gasfitters, plumbers, or other mechanics in building, altering, or repairing the premises named in this policy, will vitiate the same, unless permission for such work be endorsed in writing hereon, except in dwelling-houses only where five days are allowed in any one year for incidental repairs, without notice or endorsement.

Goods in show windows, where lights are used, must be separately and specifically insured, otherwise they are not protected by this policy.

And it is hereby understood and agreed by and between this corporation and the assured that this policy is made and accepted in reference to the foregoing terms and conditions, and to the classes of hazard and memoranda printed on the back of this policy, which is hereby declared to be a part of this contract, and to be used and resorted to in order to determine the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for in writing.

In witness whereof, the corporation of the London Assurance have caused these presents to be signed by their secretary, in the city of New York.

Countersigned at Minneapolis, this 10th day of March, A. D. 1883.

I. C. SEELEY, *Agent.*

B. LOCKWOOD, *Secretary.*

(Attached upon the face of the said policy is the following:)

21 June 1, '83. From and after date the form of this policy is amended to read, as follows: "And in consideration of an increase of hazard $2.30 additional premium is hereby charged the assured."

I. C. SEELEY, *Agent.*

Drennen, Starr & Everett.

$1,000.00 on their general stock of merchandise, consisting principally of crockery, china, glassware, silver and plated ware, cutlery, and such other merchandise usually kept for sale in a crockery store. All which contained in the five-story and basement store and brick, gravel-roof store building and under side-walk adjoint thereto, situate Nos. 509 and 511 Nicollet avenue, Minneapolis, Minn., and known as the Syndicate Block. Permission given assured to keep for sale, not to exceed five barrels, of kerosene
22 & 23 oil, which shall be of not less than U. S. standard of 110 degrees, not to be handled or sold by artificial light within the distance of 15 feet, and to use electric lights in premises herein insured.

Other insurance permitted.

This slip attached to and made a part of the policy No. 670,009—874 of the London Assurance Corporation, of London, England.

I. C. SEELEY, *Agent.*

24 UNITED STATES BRANCH OF THE LONDON ASSURANCE.

Incorporated by Royal Charter, 1720.

No. 670,008. Sum Assured, $5,000.

Head office, 7 Royal Exchange, London, E. C.

New York office, No. 88 Wall street.

This policy of insurance witnesseth: That Drennen, Starr and Everett having paid to the London Assurance Corporation, of London, the sum of fifty-five and $\frac{00}{100}$ dollars for insurance from loss or damage by fire (subject to agreements and conditions herein contained) of the property hereinafter described to the amount hereinafter mentioned, not exceeding upon any one article the sum specified upon such article, namely, five thousand dollars, as per printed form
25 attached hereto—Drennen, Starr and Everett, five thousand dollars—on their general stock of merchandise, consisting principally of crockery, china, glassware, silver and plated ware, cutlery, and such other merchandise usually kept for sale in a crockery store, all while contained in the five-story basement, stone and brick,

gravel roof store-building and under sidewalks adjacent thereto, situate Nos. 509 and 511 Niccolet avenue, Minneapolis, Minn., known as the Synicate Block. Permission given assured to keep for sale not to exceed five barrels of kerosene oil, which shall be of not less than the U. S. standard, 110 degrees, not to be handled or sold by artificial light within the distance of 15 feet, and to use electric lights in premises herein insured; other insurance permitted. Now know all men
26 by these presents, that the said corporation hereby agree to make good unto the assured, their executors, administrators, and assigns, all such loss immediate or damage not exceeding in amount the sum or sums insured as above specified, nor the interest of the insured in the property, except as herein provided, as shall happen by fire to the property so specified from the 10th day of March, one thousand eight hundred and eighty-three, at twelve o'clock at noon; the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at the office of the corporation in New York, in accordance with the terms and provisions of
27 this policy, unless the property be replaced or the corporation shall have give- notice of their intention to rebuild or repair the damaged premises.

1. If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this contract, and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or an over-valuation, or any misrepresentation whatever, either in a written application or otherwise; or if the assured shall have or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without the consent of the corporation written hereon; or if the above-mentioned premises shall be occupied or used so as to increase the risk or become vacant or unoccupied, without notice to and consent of this corporation in writing; or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the assent of this corporation endorsed hereon; or if it be a manufacturing establishment, running in whole or in part, over or extra time, or running at night, or if it shall cease to be operated, without special agreement endorsed on this policy; or if the property be sold or transferred, or any change takes place in title or possession (except by succession by reason of the death of the insured), whether by legal process, or judicial decree, or voluntary transfer or conveyance; or if this policy shall be assigned before a loss, without the consent of the corporation endorsed hereon; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy; or if the assured shall keep gunpowder, fireworks, nitro glycerine, phosphorus, saltpetre, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzole, or benzine varnish, or keep or use cam-

phene, spirit-gas, or any burning fluid or chemical oils without written permission in this policy, then, and in every such case, this policy shall be void. Kerosene oil, however, may be used for lights in dwellings, stores, churches, and school-houses, and kept for sale in stores in quantities not exceeding five barrels, to be drawn by daylight only.

2. This insurance does not apply to or cover jewels, plate, watches, musical or scientific instruments (piano-fortes in dwellings excepted), ornaments, medals, patterns, printed music, printed books, engravings, paintings, picture frames, sculpture, casts, models, or curiosities, unless particularly specified in this policy. This corporation shall not be liable, by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid; nor for loss by theft at or after a fire; nor for money or bullion, bills, notes, accounts, deeds, evidences of debt, or securities of property of any kind; nor for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power; nor for any loss in buildings unprovided with good and substantial stone or brick chimneys, the absence of which has been the cause of the fire; nor in consequence of any neglect or deviation from the laws or regulations of police, where such exist; nor for any loss caused by the explosion of gunpowder, or any explosive substance; nor by lightning, or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only, which loss shall be determined by the value of the damaged property after the casualty by explosion or lightning.

3. If a building shall fall, except as the result of a fire, all insurance by this corporation on it or its contents shall immediately cease and determine.

4. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the corporation and so expressed in the written part of this policy, otherwise the policy shall be void. When property has been sold or delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate. Goods held on storage must be separately and specifically insured.

5. In case the use or occupation of the above-mentioned premises, at any time during the period for which this policy would otherwise continue in force, shall be so changed as to increase the risk thereupon, except as may be hereafter agreed to by this corporation, in writing upon this policy, from thenceforth, so long as the same shall be used, this policy shall be of no force or effect.

6. The best endeavors of the assured shall be used in saving and protecting the property from damage at and after the fire; and in case of failure so to do, this corporation will not be liable for damage caused by such failure; and there can be no abandonment to the corporation of the property insured.

The use of general terms, or anything less than a distinct, specific

agreement, clearly expressed, and endorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein.

7. In case of any other insurance upon the property hereby insured, whether made prior or subsequent to the date of this policy, the assured shall be entitled to recover of this corporation no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon; and it is hereby declared and agreed that in the case of the assured holding any other policy in this or any other company on the property insured, subject to the conditions of average, this policy shall be subject to average in like manner. Any floating policy attaching, in whole or in part, to the property covered by this policy, shall, as between the insured and this corporation, be considered as contributing insurance for the full amount of such policy, and liable as such to pay *pro rata* any loss, total or partial, on the property insured.

Reinsurance, in case of loss, to be settled in proportion as the sum reinsured shall bear to the whole sum covered by the reinsured company.

8. This insurance may be terminated at any time at the request of the assured, in which case the corporation shall retain only the customary short rates for the time the policy has been in force. The insurance may also be terminated at any time at the option of the corporation, on giving notice to that effect and refunding a rateable proportion of the premium for the unexpired term of the policy.

9. Persons sustaining loss or damage by fire shall forthwith give notice of said loss to the corporation, and, as soon thereafter as possible, render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portion of all policies thereon, also the actual cash value of the property and their interests therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss, when and how the
28 fire originated, and shall also produce a certificate, under the hand and seal of a magistrate or notary public (nearest to the place of fire, not concerned in the loss as a creditor or otherwise, nor related to the assured), stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes the assured has, without fraud, sustained loss on the property insured to the amount which such magistrate or notary public shall certify. The assured shall, if required, submit to an examination or examinations under oath, by any person appointed by the corporation, and subscribe to such examinations when reduced to writing, and shall also produce their books of account and other vouchers, and exhibit the same for examination at the office of the corporation, and permit extracts and copies thereof to be made. The assured shall also produce certified copies of all bills and invoices, the originals of which have been lost, and shall exhibit all that remains of the property which was

covered by this policy, damaged or not damaged, for examination to any person or persons named by the corporation.

When personal property is damaged, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made and furnished to the corporation of the whole, naming the quantity, quality, and cost of each article. The amount of sound value and of damage shall then be ascertained by appraisal of each article by competent persons (not interested in the loss as creditors or otherwise, nor related to the assured or sufferers), to be mutually appointed by the assured and the corporation, their report, in writing, to be made under oath before any magistrate or other properly commissioned person; one-half of the appraisers' fees to be paid by the assured. The corporation reserves the right to take the whole or any part of the articles at their appraised value; and until such proofs, declarations, and certificates are produced and examinations and appraisals permitted by the claimant, the loss shall not be payable.

In case of loss on property held in trust or on commission, or if the interest of the assured be other than the entire and sole ownership, the names of the respective owners shall be set forth, together with their respective interests therein. If this policy is made payable, in case of loss, to a third party, or held as collateral security, the proofs of loss shall be made by the party originally insured, unless there has been an actual sale of the property insured. All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this corporation under this policy.

But provided, in case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award, in writing, shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the corporation under this policy; and, provided further, that it shall be optional with the corporation to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, giving notice of their intention so to do within thirty days after receipt of the proofs herein required; and in all cases, whether this corporation elect to build or not, the assured shall, if required, furnish plans and specifications of the buildings destroyed.

The cash value of property destroyed or damaged by fire shall in no case exceed what would be the cost to the assured, at the time of the fire, of replacing the same; and in case of the depreciation of such property, from use or otherwise, a suitable deduction from the cash cost of replacing shall be made, to ascertain the actual cash value.

Where property insured by this corporation is damaged by removal from a building in which it is exposed to loss by fire, said damage shall be borne by the insured and the insurers, in such proportion as the whole sum insured bears to the whole value of the

property insured, of which proof in due form shall be made by the claimant.

10. This insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided the premium therefor is paid and endorsed on this policy or a receipt given for the same, and it shall be considered as continued under the original representation, and for the original amounts and divisions, unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the corporation by the assured at the time of renewal, this policy and renewal shall be void.

11. It is a part of this contract that any person other than the assured, who may have procured this insurance to be taken by this corporation, shall be deemed to be the agent of the assured named in this policy, and not of this corporation under any circumstances whatever, or in any transaction relating to this insurance.

12. It is furthermore hereby expressly provided and mutually agreed that no suit or action against this corporation for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against this corporation after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding.

Gas. The generating or evaporating within the building, or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting, is prohibited under this policy, unless permitted in writing hereon.

Fences and other yard fixtures, also store furniture and fixtures, are not insured under the within policy, unless separately and specifically mentioned.

Plate-glass doors and windows, when the plates are of the dimensions of nine feet square or more, are not covered by insurance on the building, but must be separately and specifically insured.

Frescoed work, or gilding on walls or ceilings, is not covered by insurance on the building, but must be separately and specifically insured.

Builders' risk. The working of carpenters, roofers, tinsmiths, gasfitters, plumbers, or other mechanics in building, altering, repairing the premises named in this policy will vitiate the same, unless permission for such work be endorsed in writing hereon, except in dwelling houses only, where five days are allowed in any one year for incidental repairs, without notice or endorsement.

Goods in show windows, where lights are used, must be separately insured, otherwise they are not protected by this policy.

And it is hereby understood and agreed by and between this corporation and the assured that this policy is made and ac-
29 cepted in reference to the foregoing terms and conditions, and to the classes of hazard and memoranda printed on the back

of this policy, which is hereby declared to be a part of this contract, and to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein or otherwise specially provided for in writing.

In witness whereof, the corporation of the London Assurance have caused these presents to be signed by their secretary in the city of New York.

Countersigned at Minneapolis, this 10th day of March, A. D. 1883.

I. C. SEELEY, *Agent.*

B. LOCKWOOD, *Secretary.*

(Attached to the face of the above policy is the following):

30 DRENNEN, STARR AND EVERETT.

$5,000. On their general stock of merchandise, consisting principally of crockery, china, glassware, silver and plated ware, cutlery, and such other merchandise usually kept for sale in a crockery store, all contained in the first and second stories and basement of Nos. 247 and 249, and in the third story of Nos. 245, 247, and 249 Hennepin avenue, of the three-story brick, gravel roof, store building, situated on block 53, Minneapolis, Minn. Permission given assured to keep for sale, not to exceed 5 barrels of kerosene oil, which shall be of not less than the U. S. standard of 110 degrees; not to be handled or sold by artificial light within the distance of 15 feet, and to use electric lights in premises herein insured, the entire equipment being in full compliance with the standard of the New
31 York Board of Underwriters, adopted January 12th, 1882.

It being understood that no alteration shall be made in the equipment without written consent from the agent of this company.

Other insurance permitted: This slip attached and made a part of policy No. 670,008—873, of the London Assurance Corporation of London, Eng.

I. C. SEELEY, *Agent.*

MAY 5, '83.

From and after this date the form of this policy is amended to read as follows: And in consideration of an increase of hazard, $8.25 add. prem. is charged the assured.

I. C. SEELEY, *Ag't.*

32, 33 STATE OF MINNESOTA, } ss:
County of Hennipin, }

Edward D. Everett came before me personally, and, being duly sworn, doth say, that he is a member of the firm of Drennen, Starr, & Everett, and one of the plaintiffs in the above-entitled action; that the foregoing complaint is true of his own knowledge, except as to the matters herein stated on his own information and belief, and as to those matters that he believes it to be true.

EDWARD D. EVERETT.

Subscribed and sworn to before me, on this 8th day of Jan'y, A. D. 1884.

[SEAL.] R. P. J. DRENNEN,
Notary Public, Minn.

(Endorsed :) Filed Feb'y 20th, 1884. E. J. Davenport, clerk.

34 *Reply.*

STATE OF MINNESOTA, } ss:
In District Court, Hennepin County, }

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. EVERETT, partners in business under the firm name and style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION.

The plaintiffs above named, replying unto the answer of the above-named defendant herein—

First. Deny that on or about the twenty-fourth day of May, A. D. 1883, or ever, said plaintiffs became copartners with David M. Arndt mentioned in said answer, under the firm name of Drennen, Starr and Everett, or under any other firm name or at all, and deny that said plaintiffs have ever been copartners with said David M. Arndt, and deny that said David M. Arndt is a necessary
35 party to this action.

Second. Replying unto each and every of the allegations in the said answer contained in the last three lines of folio two and in folio three thereof, plaintiffs allege that the sum insured upon said property in and by said policies, was not less that $6,000, except that in the event of the whole damage suffered by plaintiffs by the destruction thereof and injury thereto by fire should be less than the whole amount of the insurance which plaintiffs had thereon at the time of any such destruction and damage, and plaintiffs allege that the amount of damage suffered by them upon said property in the destruction thereof and injury thereto by the fire mentioned in the complaint herein was not less but greatly in excess of
36 the whole amount of insurance which they then had upon said property.

Third. Deny that on May 24th, A. D. 1883, or ever, the said insurance terminated or said policies became void by the admission of said David M. Arndt as a copartner of plaintiffs, or for any other cause, and deny that they thereby or in any manner sold, transferred, or assigned to said David M. Arndt a joint or any interest with them as a copartner in the said insured property or otherwise, and deny that said David M. Arndt was admitted into copartnership by plaintiffs, or that he took possession of said property jointly with plaintiffs, or otherwise, and deny that the title, interest, or possession of plaintiffs was changed by their voluntary act or otherwise.

37 Fourth. Deny that in their proofs of loss, or in their complaint herein, or at any time or times, or in any manner, said assured, the plaintiffs herein, have ever falsely sworn or falsely represented to the defendant that the value of the property destroyed or the amount of their loss was the sum of $117,715.45; but that they have sworn, stated, and alleged that the value of such property destroyed and the amount of their loss was $117,715.45, and allege that the same was and is in all respects true, and that the value of their stock at and before said fire was fully the last-mentioned sum, and more, to wit, the sum alleged in the complaint herein.

38 Fifth. Deny that plaintiffs or either of them have ever at any time made any false oaths, representations, concerning their said stock, or the value thereof, or their said loss, or that they or either of them ever had any intent or purpose of obtaining payment from defendant for more than its just proportion of said loss, or that said policies became void, or the claims of plaintiffs against defendant barred for any cause.

Wherefore plaintiffs pray judgment, as in their complaint herein they have prayed.

L. J. C. DRENNEN,
Attorney for Plaintiffs, Minneapolis, Minnesota.
SHAW AND CRAY,
Of Counsel for Plaintiffs, Minneapolis, Minn.

STATE OF MINNESOTA, }
County of Hennepin, } *ss:*

39 Frederick W. Starr came before me personally, being duly sworn, says: That he is one of the plaintiffs in the foregoing entitled action, and that the foregoing reply is true, of his own knowledge, except as to those matters which are therein stated on information and belief, and as to those matters that he believes it to be true.

FRED. W. STARR.

Subscribed and sworn to before me, this 11th day of February, A. D. 1884.

[SEAL.] JOHN HAY,
Notary Public, Hennepin Co., Minn.

(Endorsed:) Filed Feb. 20, 1884. E. J. Davenport, clerk.

40 *Petition for Removal.*

STATE OF MINNESOTA:

In District Court, Hennepin County.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. EVERETT, partners in business under the firm name and style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION, Defendant.

To the honorable the judges of the district court of Hennepin county:

Now comes your petitioner, The London Assurance Corporation, by Cameron, Losey and Bunn and C. K. Davis, its attorneys, and respectfully represents that the plaintiffs, Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, are, and were at the time this action was commenced, citizens of the State of Minnesota, and that this defendant is, and was at the time this action was
41 commenced, a corporation duly incorporated, and by the laws of Great Britain a subject of said kingdom, and an alien.

That this suit is of a civil nature at law, and the matter in dispute exceeds, exclusive of costs, the sum or value of $500, and the controversy is between citizens of the State of Minnesota and a citizen and subject of Great Britain, and an alien.

Your petitioner makes and files in this court a bond with good and sufficient surety for its entering in the circuit court of the United States for the district or Minnesota, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly re-
42 moved thereto, and also for the appearing and entering of special bail in said suit if special bail was originally requisite therein. This application is made at the term at which this cause could be first tried, and before the trial thereof.

Your petitioner therefore prays the court to accept said petition and bond and proceed no further in said suit, and order the said cause to be transferred to the said circuit court of the United States for the district of Minnesota.

CAMERON, LOSEY & BUNN AND
C. K. DAVIS,
Att'ys for Defendant.

(Endorsed:) Filed March 17, 1884. E. J. Davenport, clerk, by C. B. Tirrell, deputy.

43 *Bond on Removal.*

Know all men by these presents that we, The London Assurance Corporation, of London, England, and I. C. Seeley, surety, are held and firmly bound unto Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, of Minneapolis, Minnesota, in the penal sum

of five hundred dollars, the payment whereof, well and truly to be made unto the said Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, their heirs and assigns, we bind ourselves, our heirs and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions, the said London Assurance Corporation having petitioned the district court of Hennepin county,
44 State of Minnesota, for the removal of a certain cause therein pending, wherein Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett are plaintiffs and The London Assurance Corporation is defendant, to the circuit court of the United States in and for the district of Minnesota: now, if the said London Assurance Corporation, your petitioner, shall enter into the said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in said circuit court in said suit, if special bail was originally re-
45 quired therein, then this obligation to be void; otherwise, in full force and virtue.

Witness our hands and seals, this 26th day of February, 1884.

LONDON ASSURANCE CORPORATION,
By GEO. C. CLARK, *Gen'l Agent.* [SEAL.]
I. C. SEELEY. [SEAL.]

STATE OF MINNESOTA, *County of Hennepin:*

I, I. C. Seeley, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say: That I am a resident of the State of Minnesota, and a property holder therein; that I am worth the sum of one thousand dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution; that I have property in the State of Minnesota liable
46 to execution of the value of more than one thousand dollars.

I. C. SEELEY. [L. S.]

Subscribed in my presence by I. C. Seeley and by him sworn to before me, this 29th day of February, 1884.

[SEAL.] J. A. WALTERS,
Notary Public of Hennepin Co., State of Minnesota.

47 *Order for Removal.*

STATE OF MINNESOTA, *County of Hennepin:*

District Court, Fourth Judicial District.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. EVERETT, partners in business under the firm name and style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION, Defendant.

On reading and filing the petition and bond of the above-named

defendant, and the said bond having been duly approved and accepted, it is ordered that this cause be, and the same is, hereby transferred and removed to the circuit court of the United States for the district of Minnesota, as in said petition prayed.

Dated this 11th day of March, 1884.

By the court:

WILLIAM LOCHREN, *Judge.*

48 STATE OF MINNESOTA, } ss:
County of Ramsey, }

C. K. Davis, having been duly sworn, deposes that on the 12th day of March, A. D. 1884, he served the within order for removal upon L. J. C. Drenner, the plaintiffs' attorney, by enclosing a true copy of such order in an envelope, sealing the same and paying postage thereon, addressing the same to the said Drenner at Minneapolis, Minnesota, the place of his office and residence, and depositing the same in the post office at St. Paul, Minnesota, the place of deponent's office and residence, and between such places there is regular communication by mail.

C. K. DAVIS.

Subscribed and sworn to before me, this 12th day of March, 1884.

[SEAL.] W. C. HUBBELL,
Notary Public, Ramsey Co., Minn.

49 (Endorsed:) Filed Mar. 24, 1884. E. J. Davenport, clerk.

STATE OF MINNESOTA, *County of Hennepin:*

I, E. J. Davenport, clerk of the district court of the 4th judicial district, county of Hennepin, State of Minnesota, do hereby certify and return to the honorable circuit court of the United States that the annexed are true and correct copies of the summons, complaint, reply, petition, bond, and order for removal of cause to United States circuit court; that I have compared the same with the originals remaining of record in my office, and find the same to be true and correct copies and transcripts thereof, and of the whole of said record.

Witness my hand and seal of said court at the city of Minneapolis, Minnesota, this 29th day of May, A. D. 1884.

50,51 [SEAL.] E. J. DAVENPORT, *Clerk,*
By H. J. ALLNOW, *Deputy.*

(Endorsed:) U. S. circuit court, district of Minn. Return from State court. Filed March 31, 1884 Oscar B. Hillis, clerk.

52 And afterwards, to wit, on said 31st day of May, 1884, defendant filed its answer in this cause in words and figures as follows, viz:

Answer.

STATE OF MINNESOTA:

In District Court for Hennepin County.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. EVERETT, partners in business under the firm name and style of DRENNEN, STARR & EVERETT, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION.

The answer of the London Assurance Corporation, by Cameron, Losey and Bunn and C. K. Davis, its attorneys, denies that the plaintiffs were, at the time of the fire, named in the complaint, or were at the commencement of this action, or at any time subsequent to the 24th day of May, 1883, copartners as alleged in the complaint, and, on the contrary, this defendant alleges that, on or about
53 said 24th day of May, A. D. 1883, the plaintiffs became copartners with one David M. Arndt, under the firm name of Drennen, Starr, and Everett, in the property insured, and that they and said David M. Arndt have ever since continued to be such copartners, and said David M. Arndt is a necessary party to this action.

The defendant denies that by the terms of said policies it insured the plaintiffs against loss in the sum of $6,000 dollars, as alleged in the complaint, and alleges that by the terms of said policy it insured the said property for such a proportion of the whole loss sustained, not exceeding $6,000 dollars, as the sum named in said policies should bear to the whole sum insured thereon, whether such other insurance was made prior or subsequent to such polices of the defendant, and whether the same was valid or not; and the de-
54 fendant alleges that at the time of the fire the whole amount insured on said property named in the complaint was 97,000 dollars.

Further answering, the defendant alleges that it was expressly agreed in said policies that if said property should be sold or transferred, or if any change should take place in the title or possession (except in case of succession by reason of the death of the assured), whether by legal process or judicial decree, or voluntary transfer or conveyance, then the policies should be void; also that when the property should be sold or incumbered, or otherwise disposed of, so that the interest or liability on the part of the assured named in the policies should cease or be changed, the insurance provided by said policies should immediately terminate. That on May 24th, A. D. 1883, the said insurance terminated, and the policies became
55 void by the admission of said David M. Arndt as a copartner, as before stated. That thereby the said plaintiffs sold, transferred, and assigned to said David M. Arndt a joint interest with them as copartner in the insured property, and the said David M. Arndt was admitted into copartnership by the plaintiffs and took possession of said property jointly with the plaintiffs, and thereby the plaintiffs' title, interest, and possession was changed by their voluntary act, without the knowledge or consent of this defendant.

Further answering, the defendant alleges that by and in said policies of insurance it was expressly contracted and agreed that all fraud or attempt at fraud by false swearing or otherwise should forfeit all claim upon the defendant, and should be a complete bar to any recovery for loss under the said policies. That in the
56 proofs of loss made by the assured, and in their sworn complaint, and at sundry and divers times since the said fire, the assured have falsely sworn and represented to the defendant that the value of the property destroyed and the amount of their loss was the sum of 117,715.45 dollars.

The defendant denies that the value of property destroyed or the amount of loss was $117,715.45, as alleged, or that the value of said property or the amount of loss was any greater sum than $80,699.84, which facts the plaintiffs at all times well knew; and they aver that the value of the stock at and before the time of the fire did not exceed 86,162.74 dollars, and that it was much less than that sum.

The defendant alleges that said false oaths and representations were made and presented to the defendant, the plaintiffs well
57 knowing them to be false, with the fraudulent intent and purpose on the part of the plaintiffs of obtaining payment of the defendant for more than its just proportion of said loss, and thereby the plaintiffs' policy became void, and any claim they may have had against the defendant became barred.

Wherefore the defendant demands judgment dismissing plaintiffs' case, with costs.

CAMERON, LOSEY & BUNN AND
C. K. DAVIS, *Defendant's Attorneys.*

STATE OF WISCONSIN, } ss:
County of La Crosse, }

Charles W. Bunn, being duly sworn, says: He is one of the defendant's attorneys in this action, and knows the contents of the foregoing answer; that the same is true to the best of his knowledge, information, and belief; that the reason why this affi-
58 davit is made by defendant is that the defendant is a foreign corporation not present, and having no officers in the county of Ramsey, Minnesota, or La Crosse county, Wisconsin, where the attorneys of the defendant reside, and therefore deponent makes this affidavit on its behalf.

CHARLES W. BUNN.

Subscribed and sworn to before me, this 8th day of February, 1884.

[SEAL.] THOMAS A. DYSON,
Notary Public, La Crosse Co., Wis.

STATE OF WISCONSIN, *County of La Crosse:*

OFFICE OF CLERK OF CIRCUIT COURT.

I, Charles Smith, clerk of the circuit court of the county of La

Crosse, in the State of Wisconsin, the said court being a court
59 of record and having a seal, do hereby certify that Thomas A. Dyson, Esquire, whose name appears subscribed to the annexed instrument, was, at the date thereof, a notary public within and for said State, residing in said county, duly appointed and qualified, and empowered by the laws of said State to administer oaths, take acknowledgments of deeds, and perform such other duties as by the law of nations or according to commercial usage may be performed by notaries public, and that to his acts and attestations as such full faith and credit are and ought to be given in court and out. I further certify that I verily believe said signature purporting to be his is genuine; that the seal thereto attached is a correct impression of his official seal, and that said instrument is executed and acknowledged according to the laws of said State.

60, 61 In witness whereof, I have hereunto set my hand, and affixed the seal of said court, at the court-house, in the city of La Crosse, in said county and State, on this 8th day of February, A. D. 1884.

[SEAL.] CHARLES SMITH,
Clerk of Circuit Court, as aforesaid.

(Endorsed:) Service of within answer by copy admitted this 9th day of Feb'y, 1884. L. J. C. Drennen, att'y for pl'ffs, per Shaw & Cray, of counsel. Filed May 31, 1884. Oscar B. Hillis, clerk.

62 And afterwards, to wit, on the first day of July, A. D. 1884, the following proceedings were had in said cause, viz:

Term Minutes, June Term, 1884. *July 1st*, 1884.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. Everett, partners in business under the firm name and style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION.

Before Justice Samuel F. Miller.

This cause being regularly called for trial, the plaintiffs appeared by L. J. C. Drennen and J. M. Shaw, their attorneys, and the defendant by Cameron, Losey & Bunn, and C. K. Davis, its attorneys; thereupon it is ordered that a jury come, to wit: R. A. Lanpher, Edward Dunn, Charles J. Yeager, J. A. Spencer, T. C. Arnold, John Beyer, Noah Sinks; and it appearing to the court that the panel of *of* regular jurors is exhausted, it is ordered that the marshal
63 call in by-standers to fill up the *the* jury; thereupon come A. Larsen, P. V. Brown, L. A. Robert, Lorenzo Hoyt, and T. J. Kennedy, twelve good and lawful men, who are duly sworn to try the issues joined herein.

Thereupon J. M. Shaw opens the case for plaintiffs.

C. K. Davis opens for defendant.

P. M. Endesley sworn & examined on behalf of def't.
O. O'Brien " " " " "
Lewis Jott " " " " "
E. E. Houghson " " " " "
And here the defendant rests.

Eugene J. A. Drennen, sworn and examined on behalf of plaintiffs.

And here the plaintiffs rest.

And the trial of said cause not being concluded at the hour of adjournment, it is ordered that further proceedings herein be postponed until to-morrow morning at 10 o'clock.

And afterwards, to wit, on July 2nd, 1884, the following further proceedings were had in said cause, viz:

64 & 65 United States Circuit Court, District of Minnesota.

Term Minutes, June Term, A. D. 1884. *July 2nd,* 1884.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. Everett, partners in business under the firm name and style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION.

Before Justice Samuel F. Miller, and Judge R. R. Nelson.

This day again come the parties, by their respective attorneys, and the jury sworn to try this cause; thereupon the court instructs the jury and they retire to consider of their verdict. After due consultation, and being fully advised concerning the same, they return into court, by their foreman, the following verdict, to wit:

"We, the jury in the above-entitled action, do find for the defendant.

"LORENZO HOYT, *Foreman.*"

It is therefore considered, ordered, and adjudged by the
66 court that the defendant go hence without day, and that it recover of and from the plaintiffs, or either of them, its costs and disbursements herein, to be taxed, and that it have execution therefor.

And afterwards, to wit, on said 2nd day of July, 1884, the following stipulation of the parties herein was filed in said cause in the clerk's office of our said court, to wit:

In the Circuit Court of the U. S., District of Minnesota.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. Everett, partners in business under the firm name and style of Drennen, Starr and Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION.

The above-named plaintiffs hereby agree to take a writ of error

from the judgment in the above-entitled action to the Su-
67 preme Court of the United States, and to file the same and a transcript of the record, in the office of the clerk of said court, on or before the second Monday in October, 1884, and it is agreed and stipulated furthermore between the parties to this action that they will submit the said case to said supreme court on both sides by printed briefs, to be filed in said supreme on or before the first Monday in November, 1884.

L. J. C. DRENNEN,
Plaintiff's Attorney.

CAMERON, LOSEY AND BROWN
AND C. K. DAVIS,
Defendant's Attorney.

(Endorsed:) Filed July 2nd, 1884. Oscar B. Hill's, clerk.

And afterwards, to wit, on the 5th day of July, 1884, the
68 following bill of exceptions were duly signed by the circuit justice, Hon. Samuel F. Miller, and ordered filed in said cause, viz:

In Circuit Court U. S., Dist. of Minnesota.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. Everett, partners in business under the firm name and style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION.

The above-entitled cause came on for hearing in the above-named court, at the June general term for the year 1884, thereof, to wit, on the 30th day of June, A. D. 1884, before the Honorable Samuel F. Miller, judge, and a jury, upon the issues joined upon, and by the pleadings, to wit, the complaint, answer, and reply.

The case was opened to the jury by J. M. Shaw, Esq., of counsel for the plaintiffs.

Thereupon it was stipulated and agreed in open court by the
69 counsel for defendant, to wit, C. K. Davis, Esq., and Messrs. Cameron, Losey and Bunn, that the defendant would withdraw and abandon the defence set up in its answer of alleged fraudulent overvaluation of the property insured and destroyed, and would rely upon the alleged defence of the avoidance of the policies by change of interest and title or possession in and to the insured property after the delivery of said policies alone; and it was further admitted by defendant that the contracts and policies of insurance had been made and delivered, and that at the time of such making and delivery the plaintiffs were the sole owners of the property thereby insured; and that the fire had occurred, and that thereby of the goods and property described in said policies there had been destroyed the amount and value as alleged in the com-
70 plaint; and that the plaintiffs had given due notice and furnished to defendant due and formal proofs of said alleged

loss; also that there were other policies of insurance upon the same property held by plaintiffs at the time of said fire and destruction, amounting to ninety-one thousand dollars, as alleged in the complaint and answer.

The plaintiff thereupon rested.

The case was thereupon opened to the jury on behalf of defendant by C. K. Davis, Esq., of counsel for defendant.

The defendant, to sustain the said issue and defence upon its part, thereupon offered in evidence the said two policies of insurance, a true copy of each of which is annexed to the complaint herein, which were received.

It was testified by Allie O'Brien, a witness for defendant,
71 and the book-keeper of plaintiffs, that on the 18th day of June, A. D. 1883, said plaintiffs received from David M. Arndt, mentioned in the pleadings, the sum of five thousand dollars in money, which said sum was thereupon placed to the credit of said David M. Arndt's individual name upon the account books of said plaintiffs, and was by plaintiffs deposited in their bank. That on the third day of July, A. D. 1883, said Arndt made and delivered to plaintiffs his promissory note for five thousand dollars, payable eighteen months after date, which was also entered upon the account books of plaintiffs to the credit of said David M. Arndt's individual name, and was received by plaintiffs as other bills receivable received by plaintiffs in their business.

It was further testified by E. J. A. Drennen, one of the plain-
72 tiffs, and admitted, that said David M. Arndt came from his home in Sandusky, Ohio, to Minneapolis, Minnesota, the place of business of said plaintiffs, and was first introduced to and became known to the plaintiffs, E. J. A. Drennen and Frederick W. Starr, on or about the 20th day of May, A. D. 1883. That thereupon negotiations were entered into between said Drennen and Starr, acting for the plaintiffs, and said Arndt concerning the forming of business relations, which negotiations resulted on the 24th day of said May in the making and signing of a written agreement, in words and figures as follows, to wit:

This agreement made and entered into this 24th day of May, A. D. 1833, by and between E. J. A. Drennen, F. W. Starr, and Edward D. Everett, who are now members of and constitute the firm of Drennen, Starr and Everett, all of the city of Minneapolis, Minnesota, parties of the first part, and D. M. Arndt, of the city
73 of Sandusky, Ohio, party of the second part, witnesseth: Said parties of the first party hereby agree to receive into their business said Arndt on the following terms and conditions:

1st. Said company is to become incorporated.

2nd. Said Arndt is to pay into said firm for its use on or before June 14th, 1883, five thousand dollars.

3rd. Said Arndt is to pay into said firm for its use, on or before January 1st, 1885, an additional sum of five thousand dollars.

4th. Said Arndt is to pay said firm interest at the rate of 8 per cent. per annum on each of said sums of five thousand dollars from

January 1st, 1883, till each of said sums shall be paid as aforesaid, the interest on last-mentioned sum to be paid semi-annually.

5th. If said Arndt shall be unable to pay said second $5,000
74 by January 1st, 1885, his interest shall be decreased 50 per cent., and until said last-mentioned sum of $5,000 shall be paid, or interest decreased as aforesaid, the liability of said Arndt therefor shall be evidenced by his promissory note executed to said firm bearing interest as aforesaid, and dated January 1st, 1883. The business to be carried on by the new company to be formed as aforesaid shall be of the same nature as that now conducted by Drennen, Starr and Everett; the name of the new company to be formed shall be determined hereafter.

It is understood and agreed that of the effects and rights of the firm of Drennen, Starr and Everett, said Drennen owns one-half and said Starr and Everett each one-fourth thereof. All said rights and effects shall be put into the corporation to be formed as afore-
said, at their value as shown by the inventory taken Janu-
75 ary 1st, 1883, less any loss, by reason of non-payment of any claim for goods sold by them before that time, and that to the amount to be contributed as aforesaid shall be added said sum of ten thousand dollars to be paid by said Arndt as aforesaid.

The interest and shares of the several parties to this agreement in the new company shall be in proportion to the amount contributed by each to its capital stock according to the plan aforesaid.

When a charter shall be procured as aforesaid 50 per cent. of the stock of said Arndt shall be held by said company, or some one in trust for it, till said second sum of $5,000, with accruing interest thereon, shall be paid. It is understood said Arndt is to attend to the book-keeping and office work of said business, and that each re-
maining partner of the firm of Drennen, Starr and Everett
76 shall actively engage in the business of the new company; that no change in the name or character of the firm of Drennen, Starr and Everett shall be made until said corporation shall be formed.

In testimony whereof, said parties hereto set their signatures, the day and year first herein written.

E. J. A. DRENNEN.
FRED. W. STARR.
DAVID M. ARNDT.

That said Edward D. Everett, one of said plaintiffs, was, at and during the time of the said negotiations and the making and sign-
ing of said contract, absent from said Minneapolis, but returned soon afterwards, and was made acquainted by his partners with the
making and contents of said written agreement; that this
77 was the final agreement between said plaintiffs and said Arndt; that immediately after the making and signing of said written agreement said Arndt went to said Sandusky, Ohio, and returned therefrom again to said Minneapolis about the 17th day of June, 1883, after the said return of said Everett, and after the said Everett had received the aforesaid information, and thereafter delivered the

money and note received by plaintiffs, as testified by the witness O'Brien; that said money and note were so delivered by said Arndt and received by said plaintiffs under and pursuant to and by virtue of the conditions of said agreement, and not otherwise.

Upon the foregoing admissions and testimony, which was all that was received or considered on said trial, the plaintiffs prayed the court to charge the jury that the making of said written
78 agreement between said plaintiffs and the said D. M. Arndt, and the subsequent reception of said money and note by plaintiffs thereunder, and entry upon the books as testified, would not and did not constitute said David M. Arndt a partner with said plaintiffs, as between themselves, and did not have the effect to assign or transfer to said Arndt any title or interest in the goods and property insured in and by said policies of insurance.

The court refused so to charge, but charged the jury that said agreement, so signed, if assented to by said Everett, and the receipt by said plaintiffs of said money and note, and the credit thereof by them in their books to said Arndt, would and did constitute said Arndt a partner with said plaintiffs, as between themselves, from the time of the receipt by plaintiffs of said money, and had
79 the effect then to convey and transfer to and vest in said Arndt a joint and undivided interest and title with said plaintiffs in said insured property.

To which refusal to charge as requested said plaintiffs then and there duly excepted, and said exception was duly noted and allowed, and to said charge of said court as given, and to each and every part thereof, said plaintiffs then and there duly excepted, and said exception was duly noted and allowed.

The plaintiffs further prayed the court to charge the jury, that if, after the making of said policies and before said loss, there had been a copartnership relation created between said plaintiffs and said Arndt, whereby there had been transferred and conveyed to said Arndt a joint and undivided interest and title with said plain-
80 tiffs in the said insured property, such fact would not have the effect to wholly avoid said policies of insurance, but that said plaintiffs might still recover at least a proportionate amount upon the policies sued upon to the extent of their remaining title and interest in said insured property. The court refused so to charge, but charged the jury that under the conditions of said policies any change in the title or possession of the insured property by voluntary assignment or transfer after the delivery of said policies without the assent of defendant would operate as an entire avoidance of said policies, and that if the plaintiffs had received said Arndt into their firm as a partner, so as to transfer and assign to and vest in him a joint and undivided interest and title with them in the insured property, that was such a change of interest and title as was within
81 the conditions of said policies, and would operate as an entire avoidance of them, and would be a bar to any recovery by plaintiffs; and that if such was the fact, their verdict must be for the defendant.

To which refusal to charge as requested, said plaintiffs then and

there duly excepted, and said exception was duly noted and allowed, and to the said charge as given by the court, and to each and every part thereof, the plaintiffs then and there duly excepted, and said exception was duly noted and allowed.

The jury thereupon, on the 2nd day of July, A. D. 1884, rendered a verdict in said cause for defendant. Whereupon the plaintiffs prayed for a bill of exceptions.

And whereas none of the aforesaid matters are of record, the
82 above bill of exceptions is duly allowed, signed, and sealed during the term, this fifth day of July, A. D. 1884.

SAM. F. MILLER, *Judge.* [SEAL.]

(Endorsed:) Filed July 5th, 1884. Oscar B. Hillis, clerk.

And afterwards, to wit, on the 12th day of July, A. D. 1884, the following proceedings in said cause was had, viz:

United States Circuit Court for the District of Minnesota. Term Minutes, June Term, A. D. 1884, July 12th, 1884.

Present: Hon. R. R. Nelson, judge.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. EVERETT, partners in business under the firm name and style of Drennen, Starr & Everett, Plaintiffs,

vs.

THE LONDON ASSURANCE CORPORATION.

The above-named plaintiffs, by their attorneys, having here-
83 tofore presented to the court a bill of exceptions excepting to the ruling of the court upon the testimony adduced and its charge to the jury in this cause, and said bill of exceptions having been signed by the court, and ordered filed and made a part of the record herein, which was accordingly done: Now this day come the plaintiffs herein by their attorneys, and present an appeal bond praying an appeal to the United States Supreme court. Whereupon said bond is approved by the Hon. R. R. Nelson, judge, and it is by the court ordered that an appeal of this cause be, and the same is hereby, allowed, and that a writ of error issue herein pursuant to law. Thereupon a citation is signed and issued herein.

And on said 12th day of July, an appeal-bond was filed and ap-
proved in said cause, said bond being in words and figures
84 as follows, to wit:

Supreme Court of the United States.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, and EDWARD D. EVERETT, partners in business under the firm name and style of Drennen, Starr & Everett, Plaintiffs

vs.

THE LONDON ASSURANCE CORPORATION, Defendant.

Know all men by these presents, that we, Eugene J. A. Drennen,

of Minneapolis, Minnesota, as principal, and Elijah A. Harmon and General A. B. Nettleton, of same place, as sureties, are held and firmly bound unto the London Assurance Corporation, in the sum of five hundred dollars, lawful money of the United States; for the payment of which, well and truly to be made to said The London Assurance Corporation, its successor or assigns, we bind our
85 selves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 11th day of July, A. D. 1884.

Whereas the above-named plaintiffs, Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, have presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Minnesota:

Now, therefore, the condition of this obligation is such, that if the above-named Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett shall prosecute their said writ of error to effect, and answer all costs if they shall fail to make good their plea
86 then this obligation shall be void; otherwise, in full force and virtue.

E. J. A. DRENNEN. [SEAL.]
ELIJAH A. HARMON. "
A. B. NETTLETON. "

Signed, sealed, and delivered in presence of—
R. P. J. DRENNEN.
L. J. P. DRENNEN.

STATE OF MINNESOTA, } ss:
County of Hennipin, }

Be it known that on this 11th day of July, A. D. 1884, personally appeared before me Eugene J. A. Drennen, Elijah A. Harmon, and A. B. Nettleton, to me personally known to be the same persons who executed the foregoing bond, and they each acknowledged they executed the same freely and voluntarily for the uses and purposes therein expressed.

[SEAL.] R. P. J. DRENNEN,
Notary Public, Hennepin County, Minnesota.

87 STATE OF MINNESOTA, } ss:
County of Hennepin, }

Elijah A. Harmon and A. B. Nettleton, being duly sworn, each for himself on his oath says: That he is a resident and freeholder of the State of Minnesota, and is worth the sum of one thousand dollars over and above all his debts and liabilities, and exclusive of his property exempt from execution, and that he is a surety in the foregoing bond.

ELIJAH A. HARMON.
A. B. NETTLETON.

Subscribed and sworn to before me, this 11th day of July, A. D. 1884.
[SEAL.] R. P. J. DRENNEN,
Notary Public, Hennepin County, Minn.

88 (Endorsed:) The within bond and sureties therein are hereby approved. R. R. Nelson, judge dist. court, U. S. dist. Minn. Filed July 12th, 1884. Oscar B. Hillis, clerk.

89 UNITED STATES OF AMERICA, }
District of Minnesota, } *ss:*

Circuit Court of the United States.

I, Oscar B. Hillis, clerk of said circuit court, do hereby certify and return to the Honorable the Supreme Court of the United States, that the foregoing, consisting of 89 pages, numbered consecutively from one to 89, inclusive, is a true and complete transcript of the records, process, pleadings, orders, final judgment, and all other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at Saint Paul, in the district of Minnesota, this 26th day of August, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth year.

[SEAL.] OSCAR B. HILLIS, *Clerk.*

[Endorsed:] United States circuit court, district of Minnesota. Eugene J. A. Drennen *et al. vs.* The London Assurance Company. Return to Supreme Court.

Endorsed on cover: Minnesota C. C. U. S. No. 935. Eugene J. A. Drennen, Frederick W. Starr, and Edward D. Everett, partners as Drennen, Starr & Everett, plaintiffs in error, *vs.* The London Assurance Corporation. Filed 15th September, 1884.

113-57

SUPREME COURT.

UNITED STATES.

OCTOBER TERM, 1884.

EUGENE J. A. DRENNEN, FREDERICK W. STARR AND EDWARD D. EVERETT, Partners as DRENNEN, STARR & EVERETT, PLAINTIFFS IN ERROR.

vs.

THE LONDON ASSURANCE CORPORATION,
DEFENDANT IN ERROR.

Brief and Argument of Plaintiffs in Error.

L. J. C. DRENNEN,
Attorney for Plaintiffs in Error.

SHAW & CRAY AND GEO. B. YOUNG,
Of Counsel.

CO-OPERATIVE PRINTING CO., 319 Nicollet Ave.

IN SUPREME COURT.

UNITED STATES.

EUGENE J. A. DRENNEN, FREDERICK W. STARR, AND EDWARD D. EVERETT,
Plaintiffs in Error,

vs.

THE LONDON ASSURANCE CORPORATION,
Defendant in Error.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

Writ of error by plaintiffs to the circuit court of the eighth circuit, district of Minnesota.

The plaintiffs in error brought this action against the defendant in error in the State court to recover for a loss under two policies of insurance made and issued to them by defendant. The cause was removed, with many others of the same character brought by the same plaintiffs against other companies, to the circuit court of the

United States for the above named district, and came on for trial at the June, 1884 term of said circuit court.

The case is of much importance in respect of the character of questions and amount involved in it, as well as from the additional consideration that twenty-four other causes for large amounts, brought by the same plaintiffs as above stated, are pending in said circuit court, for loss sustained by the same fire referred to in the complaint herein upon twenty-seven other policies, the most, if not all, of which probably involve the same questions presented by this record.

The complaint is in the ordinary form in such cases.

The defendant sets up two affirmative defences, viz:

First. Admitting the making of the policies, that the title and ownership of all the insured property, to wit, a stock of merchandise, was in the plaintiffs at the time of the issuance of the policies, that a loss by fire had occurred, and that the plaintiffs had given due notice and made due proofs of such loss; it was alleged in the answer, that after the making and delivery of the policies, and before the occurrence of the loss, a change of title in the insured property had taken place, by the admission into the firm of plaintiffs as a partner of a fourth member, whereby it was averred that there had been transferred and assigned to him a joint and undivided title and interest in such property.

Second. Fraudulent over-valuation of the property destroyed, by the plaintiffs after the loss.

At the opening of the trial the defendant expressly waived and abandoned the second of said defences, and

relied solely on the first, expressly admitting all the facts necessary to constitute *prima facie* a cause of action in favor of plaintiffs for the whole amount claimed, and assuming the burden of establishing the first and only affirmative defence relied upon.

As to this defence it was developed at the trial and held by the court that two questions were involved, viz:

1st. Whether there had been such a change of title as was alleged in the answer, or more accurately, whether there had been, after the delivery of the policies, and before the loss, a transfer or assignment of *any* title or interest in the property insured?

2nd. Whether, if so, it operated as an entire forfeiture and avoidance of the policies?

It was also held that the first of said questions depended entirely upon the construction which should be given to a certain written agreement between said plaintiffs and D. M. Arndt, the person whom it was alleged they had received into their firm, considered together with certain undisputed evidence to the effect that after said agreement said plaintiffs had received from said Arndt certain money and a note therein mentioned; and that the second of said questions was entirely a matter of the construction of the terms and conditions of the policies of insurance.

ASSIGNMENTS OF ERROR.

The plaintiffs assign as error:

1st. That the trial court erred in refusing to instruct the jury as requested by plaintiffs, "that the making of

said written agreement between said plaintiffs and the said D. M. Arndt, and the subsequent reception of said money and note by plaintiffs thereunder and entry upon their books as testified, would not and did not constitute said David M. Arndt a partner with said plaintiffs as between themselves, and did not have the effect to assign or transfer to said Arndt any title or interest in the goods and property insured in and by said policies."

2nd In charging said jury "that said agreement so signed and assented to by said Everett, and the receipt by said plaintiffs of said money and note and the credit thereof by them in their books of account to said Arndt, would and did constitute said Arndt a partner with said plaintiffs as between themselves from the time of the receipt by plaintiffs of said money, and had the effect then to convey and transfer to and vest in said Arndt a joint and undivided interest and title with said plaintiffs in said insured property."

3rd. In refusing to charge as requested by plaintiffs "that if there had been a co-partnership relation created between said plaintiffs and said Arndt, whereby there had been transferred and conveyed to said Arndt a joint and undivided interest and title with said plaintiffs in the said insured property, such fact would not have the effect to wholly avoid said policies of insurance, but that said plaintiffs might still recover at least a proportionate amount upon the policies sued upon, to the extent of their remaining title and interest in said insured property."

4th. In charging the jury "that under the condi-

tions of said policies any change in the title or possession of the insured property by voluntary assignment or transfer after the delivery of said policies without the consent of the defendant, would operate as an entire avoidance of said policies, and that if the plaintiffs had received said Arndt into their firm as a partner so as to transfer and assign to and vest in him a joint and undivided interest and title with them in the insured property, that was such a change of interest and title as was within the conditions of said policies, and would operate as an entire avoidance of them, and would be a bar to any recovery by plaintiffs; and if such was the fact, their verdict must be for the defendant."

In discussing these assignments of error, we may state the two general questions presented by the record as follows:

First. Assuming the written agreement set out in the bill of exceptions to have been an agreement between all the plaintiffs and David M. Arndt, was the effect of that agreement, considered together with the undisputed evidence that the plaintiffs received from said Arndt the money and note as shown, to assign and transfer to said Arndt presently, as between him and said plaintiffs, to wit, the firm of Drennen, Starr & Everett as it was constituted and existed at the time of the delivery of the policies, an actual, joint and undivided legal title and interest in the stock of merchandise insured?

Second. If such was the effect of said agreement

and receipt of money and note, were the policies of insurance thereby wholly avoided?

The court below has answered both of these questions in the affirmative.

I.

Our first contention is, that the first of these questions should have been answered in the negative.

The defendant alleges and argues, that by said agreement and receipt of money and note, the firm of Drennen, Starr & Everett, as constituted and existing at the time of the delivery of the policies, intended to and did actually admit and receive said Arndt into their firm as a partner *inter sese*, and *thereby* transferred and assigned to him such title and interest. We understand the court below to have adopted this view.

This we contend was error. It should be borne in mind that the agreement in question is an agreement between the *firm* of Drennen, Starr & Everett as constituted when the contracts of insurance were made, and then concededly consisting of the plaintiffs named in the complaint alone of the one part, and D M. Arndt of the other part, and that the question here is raised by the insurance company, a stranger to said agreement, for the purpose of deducing therefrom a forfeiture of its own contracts of insurance with the first of said parties, and it is conceded that the burden is upon the defendant to show that the state of things existed which it is claimed works the forfeiture.

The ultimate inquiry is, what did the parties to this

agreement intend by it? Did they intend to accomplish that which the defendant now contends they did accomplish? We presume we may confidently expect that in such a case the court will not, against the present claim of the plaintiffs, that they did not so intend, be inclined to hold that they did, unless it *clearly* appears that they did; nor indeed unless the agreement which they have made will admit of no other construction. The defendant is certainly not in a position here to demand the turning of doubtful words or meanings in its favor. There is not in the case the slightest suspicion of any fraudulent or wrongful intent on the part of the plaintiffs as against the defendant. If the policies of insurance mean what the trial court says they mean, the plaintiffs must be presumed to have understood and known that they so meant, and then it follows from the construction put by the trial court upon their agreement with Arndt, that plaintiffs have deliberately, and without any precautions to preserve their rights under their policies of insurance upon a stock of goods confessedly worth more than $100,000, and insured for nearly that, done that which they knew worked an absolute forfeiture of such insurance, and voluntarily waived the benefit of the indemnity which they had purchased and paid for in perfect good faith.

Such an intention when alleged by and in favor of an insurance company against the insured, for the purpose of working a forfeiture of its contract of insurance, is not to be lightly inferred, nor spelled out from doubtful phrases and labored surmises of *possible* intent, and such a result, being revolting to the ordinary sense of

justice and fair dealing, is not to be permitted, if, by an fair or reasonable interpretation of the evidence, it can be avoided.

Of course we do not mean to say, that, if it clearly appears that such was the intention of the plaintiffs and Arndt, the court must shut its eyes to that fact, because a seemingly harsh and unjust result will follow; but we do mean to say, that, unless it does so clearly appear, such intent will not be inferred, nor such result accomplished.

It seems to us, that the important and essential inquiry is, what did the parties to this agreement intend by the agreement itself? It is conceded that what was subsequently done, to wit, the receipt of the money and note by plaintiffs, was done under and pursuant to this agreement, and *for the only purpose of carrying out its terms*. It cannot therefore be claimed that this was done with the purpose to add to, or vary in any way the intention of the parties in the making of the agreement, or that its effect was to change or vary the original intent in any particular. If the parties did not by that agreement intend presently to admit said Arndt into the firm of plaintffs and form a partnership *inter sese*, then they did not intend that the receipt of the money and note under it should have that effect.

Our contention is: 1st. That this agreement does not by any fair or reasonable intendment contemplate that there should *ever be any co partnership relation* formed between the plaintiffs and D. M. Arndt. 2nd. That whatever business relation between plaintiffs and Arndt

was contemplated by it, was executory merely, and its complete and perfected formation depended upon conditions to be performed, and which never were performed prior to the happening of the loss.

The agreement in its whole scope and meaning contemplates clearly and only this, that the then firm of Drennen, Starr & Everett, consisting of the plaintiffs, parties of the first part, and D. M. Arndt, party of the second part, will organize a joint stock corporation for the carrying on of a business like that which the plaintiffs had been carrying on, in which plaintiffs shall have a stock interest equal in value to their stock of goods and assets to be ascertained in a manner defined, and Arndt shall have a stock interest of $10,000, which is to be furnished and contributed by him in money. The respective stock interests which each member of said corporation shall have are specifically and carefully defined in the following language:

"It is understood and agreed that of the effects and "rights of the firm of Drennen, Starr & Everett, said "Drennen owns one-half and said Starr and Everett each "one-fourth thereof, and said rights and effects shall be "put into the corporation to be formed as aforesaid at "their value as shown by the inventory taken January "1st, 1883, less any loss by reason of non-payment of "any claim for goods sold by them before that time, and "that to the amount to be contributed as aforesaid shall "be added said sum of ten thousand dollars to be paid "by said Arndt as aforesaid. The interest and shares of "the several parties to this agreement in the new com-

"pany to be formed shall be in proportion to the amounts "to be contributed by each to its capital stock according "to the plan aforesaid."

The "effects" referred to in this language were the goods insured in these policies. This language specifies specifically who were the owners of these effects, viz: The plaintiffs in this action, and it is in effect a specification that Arndt has not any title or interest in them, and is not to have any, except upon, and not until compliance with *all* the previously named conditions, and that his interest in them shall be represented by his stock in the corporation to be formed, and shall be in the proportion which his contribution shall have to the whole amount and value of such capital stock. There is no where any intimation, that before or until the performance of *all* the previously expressed conditions, shall Arndt have any ownership in the effects or goods of plaintiffs', nor except in the manner specified.

Now what are these previously expressed conditions?

The very first one is, that "said company shall become incorporated." Unless the last quoted words are to be rejected as having no meaning, we interpret them to mean, that the company and business into which Arndt is to be received is an incorporated company, doing business as such, and this taken in connection with the subsequent clause, to wit: "The business to be car- "ried on by the new company to be formed as aforesaid "shall be of the same nature as that now conducted by "Drennen, Starr & Everett, the name of the new com- "pany to be formed to be determined hereafter," is

sufficiently explanatory of the meaning of the parties in the expression at the beginning, that "the parties of the "first part hereby agree to receive *into their business* "said Arndt upon the following terms and conditions," upon which the trial court seemed to lay considerable stress.

A fair and reasonable, and as it seems to us the only fair and reasonable interpretation of these clauses, is this: The plaintiffs, Drennen, Starr & Everett, are a firm carrying on a wholesale and retail crockery business. Mr. Arndt desires to become associated in some way with them. It is agreed, not as alleged in the answer in this case, that he shall become a fourth partner under the same old firm name, but that he and they will form a joint stock corporation in which he and they shall have certain defined interests represented by stock in said corporation, and that that corporation when formed shall take up and carry on the business theretofore carried on by the plaintiffs; that his association with the plaintiffs shall be thus and not otherwise. Every essential clause in said agreement is not only consonant with this interpretation, but is consonant with no other.

In addition to those clauses already quoted we have this, "When a charter shall be procured as aforesaid, 50 "per cent of the stock of said Arndt shall be held by "said company, or some one in trust for it, till said sum "of $5,000 with accruing interest thereon shall be paid."

This $5,000 has reference to the payment to be made by Arndt which was deferred until January 1, 1885, and is consonant only with our interpretation, viz: that

it was contemplated that Arndt's interest should only be in the form of stock in the corporation, and that he should not receive an absolute title to such stock until he had actually paid for it, but that so much thereof as he had not paid for should be held as security by the company or a trustee until he did pay for it.

But if there be any obscurity in the former clauses of said agreement, as to their meaning in respect to the question under consideration, the parties have by the last clause, as it seems to us, by no uncertain or doubtful expression told us just what they did mean with respect to receiving Mr. Arndt into the firm of Drennen, Starr & Everett as a fourth partner. They have said "no change in the name or *character* of the firm of Drennen, Starr & Everett shall be made until said corporation shall be formed." What firm of Drennen, Starr & Everett? Evidently the firm consisting of these three plaintiffs, as recited in the beginning of the agreement, which is as a firm one of the parties to that agreement, which owned all of the insured property at the date of these policies, and with which the defendant contracted to insure that property.

The defendant, conceding that at the date of these policies the firm of Drennen, Starr & Everett was constituted of the plaintiffs only, and that it insured for them this property which was then theirs, alleges that after such insurance, and before the loss, that firm was changed by the admission of a fourth partner, Mr. Arndt. For evidence of such change it relies upon this agreement as expressing an intention to effect such change.

We have with confidence felt, and before the decision of his Honor the judge below should with confidence have *asserted*, that not only does this agreement not contain any evidence of such intention, but does contain direct and conclusive evidence to the contrary, and with due deference to the very learned judge who expressed that opinion, we must be permitted to say that after further and careful reflection it is our firm conviction that there was grave error in that ruling. It can scarcely be claimed that a change in the personel or constituency of a firm by the introduction of one or more new members would not be a change in its *character*. We do not see how the parties could well have selected a better word or formula of language to express their intention that the partnership firm of Drennen, Starr & Everett as theretofore and then constituted, should remain intact and continue in all respects as it had been until the happening of the event named. If the last thing which the parties have said in their agreement is that "no change in the character of the firm of plaintiffs shall be made," and if the receiving of a new member into that firm would be such change, then it is difficult to deduce from it a conclusion that they *intended* any such result.

"Whether an agreement constitutes a partnership or not depends upon the *real meaning of the parties* as expressed in the agreement itself."

"Whether two or more persons associated in business are partners as between themselves depends upon their intentions legally ascertained."

Lindley on Partnership, vol. 1, page 18, text and note and cases cited.

Parsons on Part., p. 58, star and notes.

"It has often been said that community of profits is the test of partnership. This, however, is not accurate. Whether parties are really partners or not is a question of *intention* to be decided by a consideration of the whole agreement into which they have entered, and ought not to be made to turn on one or two only of the clauses of it."

Lindley on Partnership, vol. 1, p. 19.

"Partnership is not the result of an agreement which is not concluded."

Id., p. 26.

"Partnership is not the result of an agreement to share profits so long as anything remains to be done before the right to share them accrues."

Id., p. 27.

"It is important to distinguish between actual and contemplated partnerships. Persons who are only contemplating a future partnership, or who have only entered into an agreement that they will at some future time become partners, cannot be considered as partners until the arrival of the time agreed upon. The general principle that so long as an agreement to form a partnership is executory, no partnership is formed, applies as well to ordinary partnerships as to projected companies."

Id., p. 27, notes and cases cited.

"Promoters of companies are not partners; they are,

it is true, engaged in a common object, and that object is ultimately to share profits; but their immediate object is the formation of a company, and they are only in the position of persons who intend to become partners after a company is formed."

Id., p. 31.

"If parties associated in business in such manner as to make them partners with respect to third persons expressly agree that a partnership shall not exist, they are not partners as between themselves."

"That there is a distinction between partnership as respects the people and partnership as respects the parties, is an elementary principle * * * * so plain that its only difficulty is in its application to particular cases. When the agreement is silent, there is often room for doubt as to the precise relation in which parties stand to each other * * * * but where they explicitly declare there is to be no partnership, it is unnecessary to argue further; for among themselves the law permits them to determine their respective interests by their own stipulations; it is a matter with which third persons have no concern."

Gibson, J., in Gill. *v.* Kuhn, 6 S. & R. 337.

"If parties expressly declare that they do not mean to become partners, the courts *neither consider the express contract nor their acts as creating a partnership in fact, although otherwise clearly established.*"

Wait's Ac. & Def. vol. 5, pp. 114-15. Also p. 108 and cases cited.

Kerr *v.* Potter, 6 Gill. (Md.) 404.

Gilpin *v.* Endsberg, 5 B. & Ald. 954.

We claim for this agreement, that when it says that no change in the name or character of the firm of Drennen, Starr & Everett should be made until the contemplated corporation should be formed, it is equivalent to saying that the parties do not mean that Arndt shall *ever* become a *partner* in said firm, and that his interest in the business and property of that firm shall not accrue until that time, and then only as a stock holder in such corporation.

We understand the meaning of the doctrine as enunciated in the above authorities to be that when the parties to a contract commencing any business arrangement have clearly said, that they do not mean presently to become partners as between themselves, or have said what is equivalent to that, then it once for all is settled that as between themselves they are not partners, no matter how in the absence of such an expression the court might have felt compelled to construe the other portions of their contract in that regard, and no matter how the relations which they have really or apparently assumed might be considered as between themselves and third persons seeking to charge them as partners.

It seems to us that the learned judge below was inclined to give too little attention to those parts of this agreement which seemed peculiarly and especially designed to express what the real relations between the parties were to be, and when they were to be assumed, and to place too much stress upon those portions which

were intended only to provide how Mr. Arndt should obtain the stock he was to get, and what and when he should pay for the privilege of being let in with the plaintiffs as an associate stock holder in the corporation to be formed.

The learned judge seemed to have based his opinion almost entirely upon a single clause in the agreement, viz: That Arndt "is to pay into said firm for its use" the sums named, by certain dates. His inference seems to be that Mr. Arndt could not pay into the firm of Drennen, Starr & Everett "for its use" this money without constituting him a partner with them and transferring to him a joint interest and title with them in their stock of goods, and this, notwithstanding that it was no where mentioned that he was ever to be a partner, no where intimated that it was the intention to assign or transfer to him any title or interest in the property of the firm, but was expressly stipulated that the business into which Mr. Arndt was to be introduced was a business to be owned and carried on by a corporation, which business should be of the same nature as that theretofore carried on by plaintiffs; that the property of the firm, the respective interests of the plaintiffs in which was particularly stated, should be the purchase price and consideration for the stock in said corporation which the *plaintiffs* should have, and the ten thousand dollars paid in by Arndt should be the purchase price and consideration of the stock in said corporation which Arndt should have, and that the then firm of Drennen, Starr & Everett should *not* be changed until that arrangement was brought about and perfected.

With due deference we must submit that this construction was at plain variance with the canon above laid down from the authorities, viz: "Whether persons are in reality partners or not is a question of *intention* to be decided by a consideration of the agreement into which they have entered, and ought not to be made to turn on one or two only of the clauses of it;" and further, if we should concede that this expression, in the absence of any thing else, was susceptible of no other construction than that placed upon it by the court below, if the parties have expressed an intention not to be partners, "the courts neither consider the express contract nor their acts as constituting a partnership in fact, although otherwise clearly established."

Can it be said that the *mere fact* that a person pays into a firm $10,000 for its use, and it is placed to his credit on the firm books without any stipulations whether he is or not to become a member of the firm *per se* constitutes him such member, and transfers to him an interest in all the firm property? It does not seem to us so. Possibly that fact, coupled with the previous clause that plaintiffs agree to receive Arndt into their business, might have such effect, *if it was not further expressly provided just how and when he was to be so received.*

What we contend for is, that taking the agreement all together, it cannot be gathered from it, that it was ever contemplated that there should be any change in or transfer of any interest or title from plaintiffs in their goods *until* a corporation was formed, and they were

transferred to such corporation, and plaintiffs received their stock in the corporation for them.

What was the plain intent of the parties here? Mr. Arndt, an entire stranger to the plaintiffs, comes and says, "I have $10,000 which I would like to invest in such a business as you are carrying on." The plaintiffs say, "If you will pay $5,000 of your money in here for our use by a certain date, and agree to pay $5,000 more by a certain other date, we will form a joint stock corporation in which you and we shall be associate stock holders, and we will put our partnership assets into such corporation, which together with your money shall constitute its capital stock and property, and we will each take stock in the same in proportion to our respective interests in *our* partnership assets, and you to the amount of your money, but no change shall take place in our firm until this is done. We mean to hold our firm in its present condition, with its name and character, including the title of its property unchanged, until we have formed this corporation."

Does the fact that Mr. Arndt in the meantime is willing to and does let the plaintiffs have the use of his money, necessarily conflict with this intention? It was only a way agreed upon by the parties in which Mr. Arndt should pay for the stock which he was to get, and by which, and *only* by which he was to get any interest or title in the partnership assets of plaintiffs.

Some stress was laid in argument of counsel, although not by the court, upon the clause "It is understood that said Arndt is to attend to the bookkeeping

and office work of said business, and that each remaining partner of the firm of Drennen, Starr & Everett shall actively engage in the business of the new corporation." The stress was upon the word "remaining;" the inference sought to be drawn being, that the plaintiffs were remaining or other members of a firm in which Arndt was a partner. We might say that this word "remaining" might as well be held to mean such of the plaintiffs as should remain and continue in the business of the "new company" as to have the meaning which defendant's counsel placed upon it. It seems to us that the use of the words "new company" at the end of this clause conclusively of itself demonstrates that the business in which Mr. Arndt was to act as bookkeeper, and in which the plaintiffs were to actively engage, was the business of the "new company" to be formed, and not that of the old partnership of plaintiffs; and if there was any doubt about this, the clause immediately succeeding, "that no change in the name or character of the firm of Drennen, Starr & Everett should be made until said corporation shall be formed," ought to remove the last shred of doubt as to the meaning of the parties in that regard.

See also

Clemons *v.* Haddock, 13 N. H. 185.
Polland *v.* Stanton, 7 Ala. 761.
Rice *v.* Amlin, 17 Mass. 197.
Pillsbury *v.* Pillsbury, 21 N. H. 93.
Rondel *v.* State, 49 Ala. 14.
Wicklof *v.* Dudley, 40 Ill. 406.
Listner *v.* Milliken, 47 Ill. 178.

Hubbell *v.* Wolff, 15 Ind. 204.
Statten *v.* Ham, 31 N. Y. 321.

If this agreement does not mean what we claim for it, we must respectfully insist that it certainly does not mean what the defendant claims for it. It may follow that it is so uncertain and indefinite as to be void for uncertainty. If it is so, then no such consequence as defendant claims can result.

1 Benjamin Sales, p. 74.
Adams *v.* Adams, 26 Ald. 278.
Robinson *v.* Bullock, 58 Ala. 618.
Cummins *v.* Butts, 40 Mich. 322.
Woods on Ins., sec. 312.

II.

We have heretofore reasoned upon the theory that this agreement did not contemplate a partnership relation between the plaintiffs and Arndt at any time. Let us now *suppose* that it does contemplate such relation at least temporarily. By its terms Arndt was to pay $5,000 *with eight per cent interest from January 1, 1883, on or before June 14, 1883.* This was expressly a condition precedent. He only paid the principal. Did plaintiffs waive full performance? Such waiver is not shown by any evidence, and cannot be presumed; for "a waiver is the intentional relinquishment of a known right, and there must be both knowledge of the existence of the right *and an intention to relinquish it.*"

Hoxie *v.* Home Ins. Co., 32 Conn. 40.

Benneck *v.* Insurance Co., 15 Otto, 359.
Ripley *v.* Ætna Ins. Co., 30 N. Y. 164.
Ross *v.* Lunn, 7 Lea (1 Tenn.) 467.

"A verbal agreement, to be effectual as a *waiver, variation or change* in the stipulations of a prior written contract between the parties, must rest upon some new and distinct legal consideration, or must have been so far executed or acted upon by the parties that a refusal to carry it out would operate as a fraud upon one of the parties."

Thurston & Hayes *v.* Ludwig, 6 Ohio, S. I.
Rawson *v.* Taylor *et al.*, 30 Ohio State, 400.

And the undisputed testimony of Mr. Drennen is that the agreement before the court is the final one between plaintiffs and Arndt, which testimony excludes all idea of a waiver.

In the absence of the payment of the interest, nearly $250, Arndt cannot, as between the parties to the agreement, become a partner with plaintiffs. "No partnership *inter sese* is created by a mere executory agreement to form a partnership."

Story on Part., 7 ed. p. 45, note.
Parsons on Part., 2 ed. p. 6.
Dayle *v.* Bailey, 75 Ill. 418.
Whitehill *v.* Glispee, 43 Mo. 537.
Irwin *v.* Bidwell, 72 Penn. St. 244.
Beckford *v.* Hill, 124 Mass. 588.

Even as to third parties Arndt would not be a partner, for "a person is not liable as a partner because so

held out, who has signed his name to an instrument importing that the subscribers intended, upon the fulfillment of certain conditions, to carry on business in partnership."

Parsons on Part., 138, note S.
Brown *v.* Foreth, 9 B. & C. 632.

Could it be claimed that Arndt became a partner because he, with plaintiffs, agreed to, and took some steps towards forming a corporation which was never consummated? "A liability to third persons as a partner is not necessarily the result of an abortive attempt to organize a corporation."

Blanchard *v.* Kaul, 44 Cal. 440.
Bank *v.* Hall, 35 Ohio State, 158.

"And in such case there is no partnership *inter sese*."

Story on Part., p. 70, note 2.
Wood *v.* Brigham, 127 Mass. 24.

If Arndt became a partner with plaintiffs, what was his interest in the concern? The contract is silent on this vital point, and no evidence was introduced tending to show it. It is true that to the assets of plaintiffs' firm, as shown by its inventory of January, 1883, was to be added the $10,000 to be contributed by Arndt, and that of the whole number of dollars worth thus formed he was to have 10,000 equal parts, but what were the assets of the firm in January, 1883?

The contract also provides that from plaintiffs' assets in January, 1883, should be deducted uncollectible accounts for merchandise sold prior to January, 1883. Evidently

this necessitated a selection of such accounts, and a further agreement between plaintiffs and Arndt in regard thereto, before any title to the insured merchandise could pass to him; otherwise plaintiffs could not know what they were selling, and Arndt could not know what he was buying. The payment of interest was certainly a condition precedent to the passing of title to Arndt, and the selection of uncollectible accounts as well as an agreement in reference to them was, if not a condition precedent to such passing of title, at least a concurrent condition, necessary to be performed. Therefore, the spirit of the rule stated in Benjamin on Sales, 4th American ed., sec. 364, which was quoted with approval in the Elgee Cotton Cases, 22 Wall, 188, seems to be applicable, *i. e.*, 2d. "when anything remains to be done to the goods, for the purpose of ascertaining the price, as by weighing, measuring or testing the goods, when the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained and they are in the state in which they ought to be accepted."

3d. "When the buyer is bound by the contract to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer;" and it has been held that "on a sale for cash, part payment will not vest the ownership in the vendee."

Welsh *v.* Bell, 32 Penn. St. 12.

Could it be argued that the necessity of a future selection of uncollectible accounts, and an agreement concerning them, could have no effect upon the agreement in postponing its operation? "There cannot be an executed sale so as to pass the property, when the price is to be fixed by agreement afterward, and the parties do not agree. One element of a sale is wanting just as a different element would be if the thing were not ascertained."

Witowiki *v.* Wasson, 71 N. C. 451.

Even "when the property has been delivered, if anything remains to be done by the terms of the contract before the sale is completed, the title to the property will remain in the vendor."

5 Wait's Actions and Defences, 541.

Ward *v.* Shaw, 7 Wend. 404.

Parks *v.* Mitchell, 5 N. H. 265.

Gibbs *v.* Benjamine, 54 Ver. 124.

We think the spirit of the last four quotations fully meet the inquiry. Keeping these rules in mind, we find that to constitute a partnership "there must be a lawful and valid agreement to enter into partnership, *and this contract must be executed.*"

Parsons on Part., 6.

"If the agreement of co-partnership is executory and conditional, no partnership is created by it until *all* the conditions are fulfilled."

Parsons on Part., 14.

Story on Part., p. 259, note 1, quoting.
Collyer on Part., Bk. 5, chap. 1, sec. 2, pp. 535-743.
Par. 1082 *et seq.* Perkins, Am. Ed.
Fox *v.* Clifton, 6 Bing. 776 (233).
Dickinson *v.* Valky, 10 B. & C. 128 (41).
Pitchford *v.* Davis, 5 M. & W. 2.
Murray *v.* Richards, 1 Wendell, 58.

"If parties subscribe to articles framed for the purpose of regulating their common action in regard to the common property and the prosecution of the work, they do not thereby become partners, unless the articles, in terms, established that relation."

Pillsbury *v.* Pillsbury, 20 N. H. 90.

To this let us apply a few rules on this subject in insurance cases. "An agreement to sell, although valid and binding, and capable of being enforced in equity, is not an alienation, even though possession of the property is given to the vendee. There is no alienation until the title passes."

Wood on Ins., sec. 329.
Pitney *v.* Glenn Falls Ins. Co., 65 N. Y. 6.
Hill *v.* C. V. Mu. Ins. Co., 59 Penn. St. 474.
Washington Ins. Co. *v.* Kelley, 32 Md. 421.
Phœnix Ins. Co. *v.* Lawrence, 4 Met. Ky. 9.
Jackson Ætna Ins. Co., 16 B. Momoe Ky. 242.
Trumbul *v.* Portage Ins. Co., 12 Ohio, 306.
Chandler *v.* St. Paul Ins. Co., 21 Minn. 85.

"A mere contract to sell property covered by insurance, even though the assured has bound himself to

convey upon the performance of certain conditions, does not affect the validity of the policy, and if a loss occurs before the conditions are performed, a recovery may be had by the insured; even though the conditions are subsequently performed, and it was agreed that the policy should be assigned to the purchaser, the judgment will enure to his benefit."

Wood on Ins., sec. 320.

Wheeling Ins. Co. *v.* Morrison, 11 Leigh Va. 354.

Jackson *v.* Mass. Ins. Co., 23 Pick. 418.

"An agreement to sell, though in writing, and with delivery of possession and receipt of part of the purchase money in payment, is no alienation, so long as the title has not passed, and the property remains at the risk of the vendor."

May on Ins., sec. 267.

Boston & Salem Ins. Co. *v.* Royal Ins. Co., 12 Allen, 380.

Norcross *v.* Franklin Ins. Co., 17 Penn. St. 429.

Gilbert *v.* North American Ins. Co., 23 Wend. 43.

Perry Ins. Co. *v.* Stewart, 19 Penn. St. 45.

Orrell *v.* Hampden Ins. Co., 13 Gray, 431.

"The provisions in an insurance policy that a sale or conveyance of property without the written consent of the insurance company will render the policy void, is a restriction upon the right of disposition of property and must be strictly construed. A complete sale or conveyance must be made out, and a mere contract for sale and future delivery, not destroying the title of the vendor, is not a breach of the provision."

Kempton *v.* State Ins. Co., Supreme Court Iowa, 17 N. W. Rep. 194.

Washington Ins. Co. *v.* Kelley, 32 Neb. 421.

Hill *v.* Cumberland Valley Ins. Co., 59 Penn. St. 474.

Browning *v.* Home Ins. Co., 71 N. Y. 508.

Lazarus *v.* Commonwealth Ins. Co 19 Pick. 81.

Haley *v.* Manufacturers Ins. Co., 120 Mass. 292.

Phillips *v.* Memina Ins. Co, 10 Cush. 350.

In the latest case in point which we have been able to discover the supreme court of Nebraska lays down the rule "the insurer receives the premium as the consideration to pay for loss of property by fire to a certain amount, should such loss occur. Such a contract is to be sustained if possible to do so. The insurer retains the consideration for the contract, and should be required to perform on its part, and no merely technical objection, not materially affecting the risk, is available as a defense."

Phœnix Ins. Co. *v.* Barnel, 20 N. W. Reporter, 105. Decided May 29, 1884.

The general result of all these quotations and authorities as applied to this case is, that assuming that we are wrong in our first contention that it was *never* contemplated that any *partnership* relation should exist between the plaintiffs and Arndt, and that it was contemplated that upon the performance of the covenants and conditions of the agreement between them, there should temporarily and until the formation of a corporation be such a relation, still the defendant has failed to show

such performance as would establish the partnership relation, or have the effect to transfer to Arndt any title or interest in the property of plaintiffs insured by these policies; that so far as appears the agreement between them up to the time of the fire remained executory, there being essential conditions to its going into operation with such effect, remaining unperformed.

If under that agreement it was contemplated that Mr. Arndt should immediately, upon the reception of his money by plaintiffs, take some interest and title in their insured property, then as between him and them it must be susceptible of proof what that interest was; and so long as it is not so, there was no completed agreement and no title passed. We submit that upon the evidence offered and received it is not possible to define any definite interest in Mr. Arndt, and that there was not any extrinsic evidence received or even offered, by which it would be possible to determine or arrive at any such interest.

If it was contemplated that at any time a partnership relation should exist, it was not to be, 1st. Until Mr. Arndt had done a certain thing, to wit, paid certain money *and interest.* 2nd. Until it had been ascertained by a prescribed method what interest he would be entitled to.

Neither of these things were fully done; but only one was partially accomplished.

III.

If it should be held that there was no error under

the first and second assignments, then under the third and fourth assignments is presented the question, whether, if it be conceded that the effect of the written agreement between plaintiffs and Arndt and the reception of the money and note by plaintiffs was to transfer to Arndt an undivided joint title and interest in the insured property, that fact would render the insurance policies *wholly* void?

There are, as we claim, in these policies two conditions to be considered as bearing upon this question. The first is, "if the property be sold or transferred, or if any change takes place in title or possession, * * * * by voluntary transfer or conveyance, * * * * then this policy shall be void."

The second is, "when property shall have been sold and delivered or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on such property shall immediately terminate."

The court below held these to be independent conditions, relating to distinct phases of what may be done by the owners of the property after the insurance policies are executed, meaning, if we understood the line of reasoning adopted, that, while the first clause was intended to embrace either an entire sale or transfer of the whole property, or such a conveyance or transfer as would affect any change in the title of the whole, the second was doubtless meant to refer only to sale and delivery or other disposition of *portions* of the property insured. The argument of counsel for defendant was that it had particular reference to daily sales out of a stock of goods,

and we understood the court as substantially adopting this view. It was accordingly found that the former clause exactly filled the circumstances of this case, while the latter had no relation whatever to it.

With due deference we may be permitted to say, that this seemed to us like an exceedingly liberal construction in exactly the wrong direction. In view of the manifold and complicated conditions which the astute officers of insurance companies have been accustomed to insert in the forms of policies, which they present to the unwary merchant or manufacturer, who pays his money for a supposed indemnity against loss by fire or flood, the courts have of late years felt compelled to rigidly enforce certain wholesome rules of construction, appertaining especially to this class of contracts, in which one party for a money consideration received, writes in its own words and delivers to another an agreement of indemnity. While recognizing to the fullest extent the right of insurers to frame their policies in the form which they may deem requisite for their protection against all frauds, and risks not fairly contemplated, the courts have, with great unanimity insisted, that these policies shall be plain and unambiguous in their terms, and that all conditions therein which are intended to vest in the insurer a right to declare a forfeiture of the indemnity, which has been purchased and paid for, shall not be in any wise doubtful, misleading, or of double meaning, and that stipulations in a policy are to be construed most strongly against the insurer and liberally in favor of the insured, so as not to defeat, without a plain necessity, his claim to indem-

nity, which in getting the insurance it was his object to secure. Mr. May in his excellent work on insurance uses the following significant language :

"No rule in the interpretation of a policy is more fully established, or more imperative and controlling, than that which declares that, in all cases, it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity which in making the insurance it was his object to secure. When words are without violence susceptible of two interpretations, that which will sustain his claim and cover the loss must in preference be adopted. While courts will extend all reasonable protection to insurers, by allowing them to hedge themselves about by conditions intended to guard against fraud, carelessness, want of interest and the like, they will nevertheless enforce the salutary rule of construction, that as the language of the condition is theirs, and it is therefore in their power to provide for every proper case, it is to be construed most favorably to the insured. Thus, if a stipulation be ambiguous, and no light can be thrown upon it in accordance with the received principles of law, from extrinsic evidence, the doubt is resolved against the party by whom and in whose favor the stipulation is made. The words of a promise with its exceptions and qualifications are to be considered as those of the promisor, while those of a representation on which the promise is founded are the words of the promisee."

May on Ins., par. 175.

Citing Westfall *v.* Hudson River Fire Ins. Co., 2 Duer, 49.

Cropper *v.* Western Ins. Co., 32 Penn. St. 351.

See also Woods on Ins., sec. 57.

The supreme court of Minnesota, in Chandler *v.* St. P. F. & M. Ins. Co., 21 Minn. 87 and 88, uses the following language: "The language of the condition is the language of the company, and for any ambiguity in its terms the company is responsible. If the company has seen fit to express itself in terms that require interpretation, it cannot complain if any doubt as to the meaning of the condition is resolved in favor of the assured. The rule that words are to be taken most strongly against the party using them, is more applicable to the conditions and provisos of policies of insurance than to almost any other instruments. These policies are wholly prepared by the company issuing them, and should be drafted with the most scrupulous exactness. They should be absolutely free from ambiguity. 'A policy ought to be so framed that he who runs can read. It ought to be framed with such deliberate care that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it.'" Citing

Anderson *v.* Fitzgerald, 4 H. of L., cases 484-510, and numerous other cases, both English and American.

This court, in the case of Insurance Co. *v.* Norton, 6 Otto, p. 242, uses the following language:

"Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And, where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made. * * * Courts should be liberal in construing the transaction in favor of avoiding a forfeiture."

See also Ins. Co. *v.* Eggleston, 6 Otto, 572.

In the case of Moulor *v.* American Life Ins. Co., 111 U. S. p. 341, this court says: "When a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligation of a warranty. The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself. Citing

Grace *v.* American Ins. Co., 109 U. S. 278.
National Bank *v.* Ins. Co., 95 U. S. 673.

With this principle of construction in view, let us consider for a time the conditions of the policies in question.

We have before said that the construction of the court below seemed to us a liberal construction in the wrong direction. By this we mean, that it seemed such a construction in favor of the insurer and against the insured. We think we may fairly assume, that both of these conditions have reference to the same general subject, viz: *the alienation of the insured property.* The language of the first is, "if the property be sold or transferred, or any change takes place in title or possession." The second is, "when property has been sold and delivered or otherwise disposed of so that *all* interest or liability on the part of the assured therein named has ceased." It seems to us evident that both of these clauses are general in their application to *the insured property as a whole*, and that although they might well enough be held, in a case of a sale, transfer or delivery, or change in title or possession of any part, to refer the part so alienated, there is nothing in the language used by which we must or can say that the last *any more than the first* refers to such alienation of a part. The words "sold or transferred" in the first, and "sold and delivered" in the last, are equivalent expressions. The words "or any change takes place in title or possession" in the first, and "or otherwise disposed of" in the last, may also fairly be held to be equivalent expressions. Our interpretation is, that the first and the last conditions, having equally general reference to the question as to what effect alienation of the property shall have upon the policy, the concluding clause of the last, to wit, "so that *all* interest or liability on the part of the assured herein named has ceased,"

may and ought to be held as a declaration of the final intention, and as defining explicitly what character of alienation shall have the effect to *wholly* avoid the policy, viz, such as shall divest the *entire* title and interest of the assured.

If it be answered that this would be the effect without any *expressed* condition, may it not be fairly replied that the insurers have seen fit to incorporate expressly in their policy the condition which the law would annex, viz, that whenever the assured ceased to have *any* insurable interest in the property, the policy should cease to be operative?

If we concede that the first condition, standing alone, would embrace such an alienation of an undivided joint interest as is claimed here, it might further be said that the weight of authority is, that upon such a condition, standing alone, such alienation avoids the policy. But we answer, it does not stand alone. If the idea expressed in the first condition is that *any change* in the title shall *wholly* avoid the policy, the company has seen fit to insert another condition, relative to the same subject of alienation, which is inconsistent with the idea that *any change* shall have that effect, and is only consistent with the idea that it is *only such change* as shall wholly divest the insurable interest and title of the assured, that shall have the effect to *wholly* avoid the policy.

The question seems to be, might not the ordinary business man wanting to insure his goods, having placed before him this form of policy, reading both of these conditions, fairly infer that the intention was that so long

as he retained any insurable interest in the goods insured, his policy would afford him indemnity for the loss of that interest?

If it is so, then the case comes clearly within the spirit and letter of the foregoing authorities.

We do not understand, that we are to be held with rigid exactness to the technical construction, which an astute lawyer or a learned judge might, after careful consideration put upon these conditions, but that, if the terms require interpretation, if there be any doubt as to their meaning, an interpretation will be adopted and that that doubt resolved in favor of the assured, so as to avoid the possibility that he might have been caught by ambiguous or doubtful expressions. Is the court prepared to say that the policy is framed with such scrupulous care and exactness that, in the language of the court in Anderson *v.* Fitzgerald, *supra*, "he who runs can read," its meaning to be, that a sale to another of an undivided joint interest in the property insured shall have the effect to *wholly* avoid his policy?

In the case of Burkhart *v.* Ins. Co., Sup. Court Penn. Reporter, vol 16, p. 499, we find the following: "Where a party uses an expression of his liability having two meanings, one broader and the other more narrow, and each equally probable, he cannot, after an acceptance by the other contracting party, set up the narrow construction. Citing 2d Wharton on Con., sec. 670. Hence when an insurance company tenders a policy to a party seeking to be insured, and uses in the policy ambiguous words, these words will be held to have the meaning

most favorable to the insured, as the presumption is that on this construction he took the policy, and as the company could have avoided the difficulty by being more specific." Citing

Fowkes *v.* Ins. Co., 3 B. & S. 917.

"It is now well recognized as a general rule, that where a stipulation in, or an exception to a policy of insurance emanating from the insurers is capable of two meanings, the one is to be adopted which is more favorable to the insured." Citing

Allen *v.* Ins. Co., 85 N. Y. 473.

"In case of doubt as to the meaning of terms emanating from an insurance company, they are to be most strongly construed against the insurer." Citing

Wilson *v.* Ins. Co., 4 R. I. 156.

Bartlett *v.* Ins. Co., 46 Me. 500.

Ins. Co. *v.* Slaughter, 12 Wall. 404.

Ins. Co. *v.* Burroughs, 19 P. F. Smith (Penn.) 43.

We submit finally upon this question, that, while this defendant in attempting to guard against liability in case of alienation of the insured property, and to provide for a forfeiture of the contract in case of such alienation, may have made use of one condition or form of language, which, if standing alone might, if it be found that plaintiffs have transferred a joint and undivided interest and title in the insured property to a stranger, subject plaintiffs to an entire forfeiture of their policy, have in the same policy, and with respect to the same subject matter, made use of another condition and form of language,

which at least with equal certainty declares, that it is an alienation of the *whole* title and interest of the insured which shall have such effect. Under the principles laid down in the foregoing authorities there would seem to be but little if any doubt about which of these seemingly conflicting conditions, (if indeed they are so), should have effect in this case. If the first condition means what is claimed for it by defendant, it was in itself sufficient to *cover all and every case of alienation.*

Why insert the last? It had some purpose. We cannot reject it. Was the purpose of it a final declaration of the true intent of what had gone before, or was it to confuse the policy holder? It cannot indeed be said that the first condition is *necessarily* inconsistent with the last, because the words "any change in the title or possession" might quite as well refer to a complete and entire change or transfer of the whole title, as to such a change as would be effected by the conveyance of an undivided interest.

IV.

We have heretofore reasoned upon the assumption, that under a sole provision in a policy of insurance, providing that any change in the title of the insured property should avoid the policy, such a transfer as is claimed in this case might be within such condition. This, however, we are not to be understood as conceding. Upon a careful examination of the text-books we have found no case cited which so declares. The defendant's counsel in the court below cited but one, viz: the Malley Case

recently decided by the supreme court of Connecticut; Malley *v.* A. F. & M. Ins. Co., reported Ins. Law Journal, vol. 13, p. 38. The case of Hoffman *v.* Ins. Co., 32 N. Y. 405, was referred to as intimating that such was the rule, but this question was not in that case. The only question there was as to whether a transfer of his interest by *one partner to another* avoided the policy, and it was held that it did not. And such is now the generally accepted doctrine as shown by that case, and see Woods on Insurance, p. 564, *et seq*, and notes and cases cited.

The Malley Case above referred to doubtless holds, that the introduction of a new partner in such way as to transfer to him an interest in the insured property would, under such a sole condition, avoid the policy. So far as we can ascertain, this question has never been before this court.

We will suggest that such a change of title would scarcely bring a case within the principle, which is said to underlie the object of insurance companies in introducing such clauses into their policies. It is said that such object is "that the interest shall not change so that the assured shall have a greater temptation or motive to burn the property, or less interest or watchfulness in guarding and preserving it from destruction by fire."

See May on Ins., p. 299.

Ayres *v.* Hartford Ins. Co., 17 Iowa, 176.

It would seem somewhat difficult to conceive why an owner of property with insurance upon it, should have less interest in preserving it, or greater temptation to burn it, simply because he has happened to convey a

small interest in it to another, whom he has associated with himself as a partner.

Policies not unfrequently contain express conditions providing that a change in the partnership of an insured firm, or a conveyance of an undivided interest in the property insured, shall avoid the policy. With such a condition, unqualified by any other, there would seem to be no doubt that such change or conveyance would wholly avoid the policy.

But is it a *necessary* construction of the condition "if any change takes place in the title or possession" that anything less than a change or shifting of the *entire* title or entire possession and control shall have such effect? When the company in its policy speaks of "the title" or "possession" of insured property with reference to the effect which a change or alienation of "the title" or "possession" shall have upon the policy, may it not fairly be open to the construction, that they mean to speak of such "title" as an *entirety*, and of such "possession" as involving the idea of an entire relinquishment by the insured?

If it meant more or less than that, it was easy to say so; and, under the rules of construction above laid down, should it not be held to say so? The Malley Case cites with disapproval a seemingly contrary decision in Iowa, viz: Cowan *v.* Ins. Co., 40 Iowa, 551, to which we invite the attention of the court.

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